CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 30 SEPTEMBER 4, 1996 NO. 36

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 96–62)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts approved May 6, 1996, to May 31, 1996, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and an approval under Treasury Decision 84–49.

In the synopses below are listed for each drawback contract approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Port Director to whom the contract was forwarded or approved by, and the date on which it was approved.

Dated: August 16, 1996.

JERRY LADERBERG,
Acting Director,
International Trade Compliance Division.

(A) Company: AlliedSignal Inc.
Articles: Transformer core alloy (ribbon); metglas distribution transformer cores
Merchandise: Ferroboron
Factories: Parsippany, NJ; Conway, SC
Proposal signed: January 3, 1996
Basis of claim: Appearing in
Contract forwarded to PD of Customs: New York, May 21, 1996

(B) Company: Aluminum Company of America
Articles: Aluminum alloys in 7XXX and 2XXX series
Merchandise: Chromium briquettes
Factories: Massena, NY; Lafayette, IN; Davenport, IA; Rockdale, TX
Proposal signed: January 25, 1996
Basis of claim: Appearing in
Contract forwarded to PD of Customs: New York, May 31, 1996

(C) Company: Bominflot Delaware, Inc.
Articles: Intermediate fuel oil; marine diesel oil; marine gas oil
Merchandise: Marine diesel oil; residual oil (No. 6)
Factory: Wilmington, DE (an agent operating under T.D. 81–181)
Proposal signed: November 27, 1995
Basis of claim: Used in
Contract forwarded to PD of Customs: Houston, May 8, 1996

(D) Company: CPC International Inc.
Articles: Peanut butter
Merchandise: Peanut slurry
Factory: Little Rock, AR
Proposal signed: January 12, 1996
Basis of claim: Appearing in
Contract forwarded to PD of Customs: New York, May 22, 1996

(E) Company: Calciner Industries, Inc. (successor to ABB Trading (US) Inc.'s, T.D. 92–34–A under 19 USC 1313(s))
Articles: Calcined petroleum coke
Merchandise: Petroleum coke
Factories: Chalmette, Norco & Gramercy, LA; Purvis, MS
Proposal signed: May 9, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: New Orleans, May 21, 1996

(F) Company: Ciba-Geigy Corp.
Articles: Banner® (aka Alamo®); Tilt®
Merchandise: Propiconazole Technical
Factories: McIntosh, AL; Bridgeton, MO
Proposal signed: February 6, 1996
Basis of claim: Appearing in
Contract forwarded to PD of Customs: New York, May 31, 1996

(G) Company: CONDEA Vista Co.
Articles: Alcohol; alumina
Merchandise: Aluminum powder
Factory: Westlake, LA
Proposal signed: April 19, 1996
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract issued by PD of Customs in accordance with § 191.25(b)(2): Houston, May 29, 1996
Revokes: T.D. 86–125–Z to cover successorship of Vista Chemical Co.

(H) Company: CONDEA Vista Co.
Articles: Alfol 1214 GC alcohol
Merchandise: Alfol 1214 fatty alcohol
Factory: Westlake, LA
Proposal signed: April 30, 1996
Basis of claim: Used in
Contract issued by PD of Customs in accordance with § 191.25(b)(2): Houston, May 29, 1996
Revokes: T.D. 87–102–Z to cover successorship of Vista Chemical Co.

(I) Company: CONDEA Vista Co.
Articles: Linear alkyl benzenes and mixes thereof
Merchandise: Paraffins, light (C10–12); paraffins, heavy (C12–14); olefins (C10–12)
Factories: Westlake, LA; Baltimore, MD
Proposal signed: April 30, 1996
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract issued by PD of Customs in accordance with § 191.25(b)(2): Houston, May 29, 1996
Revokes: T.D. 96–45–Z to cover successorship of Vista Chemical Co.

(J) Company: Constar International
Articles: Plastic bottle preforms; plastic bottles
Merchandise: PET resin thermoplastic polyester
Factories: Jackson, MS; City of Industry, CA; Phoenix, AZ; Greenville, SC; Charlotte, NC; Reserve, LA; Collierville, TN; Atlanta & Mableton, GA; Havre De Grace, MD (2); Kansas City, KS (2); New Stanton, PA; Hebron, OH; Houston & Dallas, TX; Leominster, MA; Birmingham, AL; West Chicago, IL (2); Salt Lake City, UT
Proposal signed: February 27, 1996
Basis of claim: Appearing in
Contract issued by PD of Customs in accordance with § 191.25(b)(2): Houston, May 6, 1996
Revokes: T.D. 96–26–F to cover additional factories

(K) Company: Eastman Chemical Co.
Articles: DOA (dioctyladipate); tenite butyrate; tenite propionate
Merchandise: Adipic acid
Factory: Kingsport, TN
Proposal signed: August 9, 1995
Basis of claim: Used in
Contract forwarded to PD of Customs: New York, May 20, 1996

(L) Company: The Geon Co.
Articles: Vinyl chloride monomer (VCM)
Merchandise: Ethylene
Factory: LaPort, TX
Proposal signed: January 23, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Houston, May 21, 1996

(M) Company: Hanover Foods Corp.
Articles: Canned concentrated orange juice
Merchandise: Concentrated orange juice for manufacturing
Factory: Hanover, PA
Proposal signed: August 18, 1995
Basis of claim: Used in
Contract forwarded to PD of Customs: Miami, May 21, 1996

(N) Company: Novus International, Inc.
Articles: Feed supplement Alimet®
Merchandise: Methyl mercaptopropion aldehyde (MMP)
Factory: Chocolate Bayou, TX
Proposal signed: August 10, 1995
Basis of claim: Used in
Contract forwarded to PD of Customs: Boston, May 21, 1996

(O) Company: Rohm and Haas Co.
Articles: Inhibited methyl methacrylate
Merchandise: Acetone; methyl alcohol
Factories: at its agents operating under T.D. 55027(2) and/or T.D. 55207(1)
Proposal signed: March 27, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Houston, May 7, 1996

(P) Company: Rohm and Haas Co.
Articles: Inhibited butyl acrylates
Merchandise: n-butyl alcohol; crude acrylic acid; industrial grade acrylic acid
Factories: Deer Park, TX (an agent operating under T.D. 55027(2) and/or T.D. 55207(1))
Proposal signed: March 26, 1996
Basis of claim; Used in
Contract forwarded to PD of Customs: Houston, May 20, 1996

(Q) Company: Rohm and Haas Co.
Articles: Crude acrylic acid
Merchandise: Propylene
Factories: Deer Park, TX (an agent operating under T.D. 55027(2) and/or T.D. 55207(1))
Proposal signed: March 26, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Houston, May 20, 1996

(R) Company: Rohm and Haas Co.
Articles: Glacial/flocculated acrylic acid
Merchandise: Acrylic acid
Factories: Deer Park, TX (an agent operating under T.D. 55027(2) and/or T.D. 55207(1))
Proposal signed: March 26, 1996
Basis of claim: Appearing in
Contract forwarded to PD of Customs: Houston, May 21, 1996

(S) Company: Rohm and Haas Co. (successor to Rohm and Haas Delaware Valley, Inc.'s T.D. 95–85–X under 19 U.S.C. 1313(s))
Articles: Acryloid and other modifiers; emulsions; acryloid solution coatings; monomer blends
Merchandise: Butyl acrylate
Factories: Philadelphia & Bristol, PA
Proposal signed: April 1, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Houston, May 24, 1996

(T) Company: Rohm and Haas Co. (successor to Rohm and Haas Delaware Valley, Inc.'s T.D. 96–17–V under 19 U.S.C. 1313(s))
Articles: Plexiglass sheet; plexiglas & implex molding powders; Kydex sheet; distilled grades of inhibited and/or uninhibited methyl methacrylate; specialty methacrylate; monomer blends; acryloid modifiers (K series); various other modifiers; emulsions (Rhoplex; Primal; Acrysol; Rhotex); acryloid solution & solid coatings; acryloid coatings & resins; Paraplex P series; orthochrom-Primal colors & auxiliaries; oil additives (VI improvers, HF grades & miscellaneous)
Merchandise: Methyl methacrylate
Factories: Philadelphia & Bristol, PA
Proposal signed: March 27, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Houston, May 24, 1996

(U) Company: Rohm and Haas Texas Inc.
Articles: Inhibited butyl acrylates
Merchandise: n-butyl alcohol; crude acrylic acid; industrial grade acrylic acid
Factory: Deer Park, TX
Proposal signed: March 27, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Houston, May 20, 1996
Revokes: T.D. 95–56–S

(V) Company: Rohm and Haas Texas Inc.
Articles: Crude acrylic acid
Merchandise: Propylene
Factory: Deer Park, TX
Proposal signed: March 26, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Houston, May 20, 1996
Revokes: T.D. 95–70–V

(W) Company: Rohm and Haas Texas Inc.
Articles: Glacial/flocculated acrylic acid
Merchandise: Acrylic acid
Factory: Deer Park, TX
Proposal signed: March 27, 1996
Basis of claim: Appearing in
Contract forwarded to PD of Customs: Houston, May 21, 1996
Revokes: T.D. 95–70–W

(X) Company: Sterling Chemicals, Inc.
Articles: Styrene; ethylbenzene; toluene
Merchandise: Benzene; ethylene
Factory: Texas City, TX
Proposal signed: March 20, 1996
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to PD of Customs: Houston, May 21, 1996
Revokes: T.D. 91–86–V

(Y) Company: United Chem-Con Manufacturing, Inc.
Articles: Aluminum electrolytic capacitors
Merchandise: Etched and formed capacitor grade aluminum anode foil; etched capacitor grade aluminum cathode foil; etched and formed capacitor grade aluminum cathode foil
Factory: Lansing, NC
Proposal signed: October 11, 1995
Basis of claim: Appearing in
Contract forwarded to PD of Customs: New York, May 20, 1996

(Z) Company: Unitex Chemical Corp.
Articles: N-ethyl-o/p-toluenesulfonamide
Merchandise: o/p toluenesulfonyl chloride
Factory: Greensboro, NC
Proposal signed: February 9, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Miami, May 21, 1996

APPROVAL UNDER T.D. 84–49

(1) Company: Atlantic-Richfield Corp.
Articles: Petroleum products and petrochemicals
Merchandise: Crude petroleum and petroleum derivatives
Factories: Carson, CA; Blaine, WA
Proposal signed: February 28, 1996
Basis of claim: As provided in T.D. 84–49
Contract forwarded to PD of Customs: Houston, May 31, 1996

19 CFR Part 101

(T.D. 96–63)

EXTENSION OF PORT LIMITS OF PUGET SOUND, WASHINGTON

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations pertaining to the field organization of Customs by extending the geographical limits of the consolidated port of entry of Puget Sound, Washington. The current boundaries have been extended to include the portion of King County, Washington, which lies between the boundaries of the Port of Seattle and the Port of Tacoma. The boundaries have been changed because various commercial operations requiring the services of Customs personnel have been established in areas beyond the current limits of the consolidated port.

EFFECTIVE DATE: September 23, 1996.

FOR FURTHER INFORMATION CONTACT: Patricia M. Duffy, Office of Field Operations, 202–927–0540.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the general public, Customs is extending the geographical limits of the consolidated port of entry of Puget Sound, Washington. The geographical limits of the consolidated Port of Puget Sound include Seattle, Anacortes, Bellingham, Everett, Friday Harbor, Neah Bay, Olympia, Port Angeles, Port Townsend and Tacoma. This document amends the port description of Puget Sound to include within the port description of Seattle the portion of King County, Washington, which before this document was between the boundaries of the Port of Seattle and the Port of Tacoma. The boundaries are being changed to help serve the various commercial operations located in the area which require the services of Customs personnel.

The decision to extend the port limits of Seattle, and accordingly, the port limits of the consolidated Port of Puget Sound, has been made after a Notice of Proposed Rulemaking concerning this matter was published in the Federal Register (60 FR 47504) on September 13, 1995, requesting comments from the public and no comments were received.

In accordance with the decision to extend the port limits, the list of Customs ports of entry in 19 CFR 101.3 (b)(1) is amended as described below.

NEW PUGET SOUND PORT LIMITS

The geographical area within the boundaries of the Consolidated Port of Puget Sound are as follows:

The ports of Seattle (Section 35, Township 27 North, Range 3 East, West Meridian, County of Snohomish, and the geographical area beginning at the intersection of NW. 205th Street and the waters of Puget Sound, proceeding in an easterly direction along the King County line to its intersection with 100th Avenue N.E., thence southerly along 100th Avenue N.E. and its continuation to the intersection of 100th Avenue S.E. and S.E. 240th Street, thence westerly along S.E. 240th Street, to its intersection with North Central Avenue, thence southerly along North Central Avenue, its continuation as South Central Avenue and 83rd Avenue South and its connection to Auburn Way North, thence southerly along Auburn Way North and its continuation as Auburn Way South to its intersection with State Highway 18, thence westerly along Highway 18 to its intersection with A Street S.E., then southerly along A Street S.E. to its intersection with the King County Line, then westerly along the King County Line to its intersection with the waters of Puget Sound and then northerly along the shores of Puget Sound to its intersection with N.W. 205th Street, the point of beginning, all within the County of King, State of Washington), Anacortes, Bellingham, Everett, Friday Harbor, Neah Bay, Olympia, Port Angeles, Port Townsend, and the territory in Tacoma beginning at the intersection of the westernmost city limits of Tacoma and The Narrows and proceed-

ing in an easterly, then southerly, then easterly direction along the city limits of Tacoma to its intersection with Pacific Highway (U.S. Route 99), then proceeding in a southerly direction along Pacific Highway to its intersection with Union Avenue Extended and continuing in a southerly direction along Union Avenue Extended to its intersection with the northwest corner of McChord Air Force Base, then proceeding along the northern, then western, then southern boundary of McChord Air Force Base to its intersection, just west of Lake Mondress, with the northern boundary of the Fort Lewis Military Reservation, then proceeding in an easterly direction along the northern boundary of the Fort Lewis Military Reservation to its intersection with Pacific Avenue, then proceeding in a southerly direction along Pacific Avenue to its intersection with National Park Highway, then proceeding in a southeasterly direction along National Park Highway to its intersection with 224th Street, East, then proceeding in an easterly direction along 244th Street, East, to its intersection with Meridian Street, South, then proceeding in a northerly direction along Meridian Street to the northern boundary of Pierce County, then proceeding in a westerly direction along the northern boundary of Pierce County to its intersection with Puget Sound, then proceeding in a generally southwesterly direction along the banks of the East Passage of Puget Sound, Commencement Bay, and The Narrows to the point of intersection with the westernmost city limits of Tacoma, including all points and places on the southern boundary of the Juan de Fuca Strait from the eastern port limits of Neah Bay to the western port limits of Port Townsend, all points and places on the western boundary of Puget Sound, including Hood Canal, from the port limits of Port Townsend to the northern port limits of Olympia, all points and places on the southern boundary of Puget Sound from the port limits of Olympia to the western port limits of Tacoma, and all points and places on the eastern boundary of Puget Sound and contiguous waters from the port limits of Tacoma north to the southern port limits of Bellingham, all in the State of Washington.

Regulatory Flexibility Act and Executive Order 12866

Although Customs solicited public comments on this port extension, no notice of proposed rulemaking was required pursuant to 5 U.S.C. 553 because the port extension relates to agency management and organization. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq).* Agency organization matters such as this port extension are exempt from consideration under Executive Order 12866.

Drafting Information

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

AMENDMENTS TO THE REGULATIONS

Accordingly, Part 101 of the Customs Regulations is amended as set forth below:

PART 101—GENERAL PROVISIONS

1. The general authority citation for Part 101 and the specific authority citation for § 101.3 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624.

Sections 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b;

* * * * * * *

2. Section 101.3(b)(1) is amended by removing the reference "T.D. 83–146" in the "Limits of port" column adjacent to the entry of Puget Sound in the "Ports of entry" column under the state of Washington and by adding the reference "T.D. 96–63" in its place.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: July 29, 1996.

DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, August 23, 1996 (61 FR 43428)]

U.S. Customs Service

General Notices

DATES AND DRAFT AGENDA OF THE FOURTEENTH SESSION OF THE HARMONIZED SYSTEM REVIEW SUBCOMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

AGENCIES: U.S. Customs Service, Department of the Treasury, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the fourteenth session of the Harmonized System Review Subcommittee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Review Subcommittee of the World Customs Organization.

DATE: August 16, 1996.

FOR FURTHER INFORMATION CONTACT: Eugene A. Rosengarden, Director, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (202–205–2592) or Myles B. Harmon, Director, International Agreements Staff, U.S. Customs Service (202–482–7000).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an international nomenclature system, forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States ("HTSUS"). The Harmonized System Convention is under the jurisdiction of the World Customs Organization ("WCO") (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classifi-

cation decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in Brussels, Belgium.

In order to ensure that the Harmonized System continued to reflect changes in technology and in patterns of international trade, the Harmonized System Review Subcommittee ("RSC") was created as a subcommittee of the HSC. The RSC is responsible for conducting systematic reviews of the Harmonized System on a regular basis in order to assist the HSC in ensuring that the Harmonized System is kept up to date as envisaged by Article 7.1 (a) of the Harmonized System Convention. The first general review of the harmonized System by the RSC was completed in 1993 and was implemented internationally on January 1, 1996. At its eleventh session, the RSC began work on its next general review of the Harmonized System.

The next session of the HSC will be its fourteenth, and it will be held from September 5–13, 1996, in Brussels, Belgium.

In accordance with Section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418), the U.S. Department of the Treasury, represented by the U.S. Customs Service, the U.S. Department of Commerce, represented by the Bureau of Census, and the U.S. International Trade Commission ("ITC"), jointly represent the U.S. government at the sessions of the HSC and RSC. The Customs Service representative serves as the head of the delegation at the sessions of the HSC. The ITC representative serves as the head of the delegation at the sessions of the RSC.

Set forth below is the draft agenda for the next session of the RSC. Copies of available agenda-item documents may be obtained from either the Customs Service or the ITC. Comments on agenda items may be directed to the above-listed individuals. In addition, proposals for new matters or items for consideration at future sessions of the RSC may be directed to those same individuals.

MYLES HARMON,,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

[Attachment: Attachment A]

Attachment A
40.216 E

DRAFT AGENDA FOR THE FOURTEENTH SESSION OF THE HARMONIZED SYSTEM REVIEW SUBCOMMITTEE

Thursday, September 5 (10 a.m.) to Friday, September 13, 1996

I

ADOPTION OF THE AGENDA

Draft Agenda ..... Doc. 40.216

II

TECHNICAL QUESTIONS

A. *Further Studies:*

1. Separate identification of certain specific categories of wastes (based on the EC, OECD and UNEP proposals) ..... Doc. 40.217
2. Distinction to be made between headings 85.37 and 90.32 ..... Doc. 40.218
3. Proposals by the World Trade Organization concerning the possible separate identification in the HS of goods for military use ..... Doc. 40.219
4. Possible transfer of products from headings 85.06 and 84.23 to headings 84.67 and 90.16, respectively ..... Doc. 40.220
5. Possible amendment to heading 20.07 to cover preparations which have been heat-treated ..... Doc. 40.247 40.355
6. Possible amendments to the Nomenclature or Explanatory Notes to clarify the classification of heat-treated minerals ..... Doc. 40.248
7. Possible amendments to heading 22.08 to create further subheadings for spirits obtained by distilling grape wine or grape marc and for whiskies Doc. 40.250
8. Thickness criterion for flat-rolled products of iron or non-alloy steel, plated or coated with tin ..... Doc. 40.252
9. Separate identification of anti-corrosive flat-rolled products of iron or non-alloy steel, electrolytically plated or coated with zinc ..... Doc. 40.253
10. Separate identification of anti-corrosive flat-rolled products of iron or non-alloy steel, plated or coated with zinc otherwise than electrolytically .. Doc. 40.254
11. Proposal by the EC for the amendment of heading 25.07 ..... Doc. 40.255
12. Possible amendment to the texts of subheadings 3920.41 and 3920.42 . Doc. 40.256
13. Proposal by the OPCW concerning chemicals controlled by the Chemical Weapons Convention ..... Docs. 40.257 40.479
14. Proposal by the UNDCP concerning drugs and psychotropic substances controlled by the UN Conventions ..... Doc. 40.258
15. Possible amendments to the Nomenclature to clarify the classification of burdock ..... Doc. 40.371
16. Possible amendment to heading 29.40 to clarify the classification of sugar acetals ..... Doc. 40.261

B. *New Questions:*

(a) *Questions referred by the HSC:*

1. Possible amendment to the text of heading 85.18 and subheading 8518.30 and to the Explanatory Note concerned ..... Doc. 40.363
2. Possible amendment to the Nomenclature to clarify the scope of the expression "orthopaedic appliances" in heading 90.21 ..... Doc. 40.364

(b) *Proposals by administrations:*

1. Proposals by the Swiss Administration for amendment to Chapter 17, 18 and 19 ..... Doc. 40.049 (RSC/13)
2. Possible amendments to headings 69.04, 69.05 and 69.06 ..... Doc. 40.024 (RSC/13)

TECHNICAL QUESTIONS—continued

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 14, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

JOHN B. ELKINS,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF "LITE STIK GLOWING GHOST DECORATION"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of a "Lite Stik Glowing Ghost Decoration." Notice of the proposed revocation was published July 3, 1996, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after November 4, 1996.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Food and Chemicals Classification Branch, (202–482–6958).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 3, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 27, proposing to modify Headquarters Ruling Letter (HRL) 555610, dated February 1, 1991, which classified a product identified as a "Lite Stik Glowing Ghost Decoration" (Item 24100) under subheading 9505.90.6000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Festive, carnival or other entertainment articles, including magic tricks and prac-

tical joke articles; parts and accessories thereof: Other: Other." No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying HRL 555610 to reflect the proper classification of the "Lite Stik Glowing Ghost Decoration" within subheading 3926.40.0000, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Statuettes and other ornamental articles." This provision is dutiable at the general one rate of 5.3 percent *ad valorem*. HRL 555610, is set forth in the Attachment to this document.

At this time, it is Customs position that the "Lite Stik Glowing Ghost Decoration" does not meet the criteria for festive articles. The fact that the article is identified as a "ghost decoration" does not, in and of itself, convey the requisite association with Halloween. Ghosts and goblins are not particularly Halloween related since they often appear in mythology, movies or cartoons of no significance to Halloween.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: August 13, 1996.

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 13, 1996.

CLA–2 RR:TC:FC 958482 ASM
Category: Classification
Tariff No. 3926.40.0000

MS. MARY ANN DAY
IMPORT DEPARTMENT
SPEARHEAD INDUSTRIES, INC.
Suite 502
401 Adams Ave.
Scranton, PA 18510

Re: Modification of HRL 555610 concerning the tarIff classification of "Lite Stik Glowing Ghost Decoration."

DEAR MS. DAY:

This letter concerns the modification of Headquarters Ruling letter (HRL) 555610, dated February 1, 1991, in which you were advised of the classification of a "Lite Stik Glow-

ing Ghost Decoration" (Item No. 24100) under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of HRL 555610, was published July 3, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 27.

Facts:

The subject article is known as a "Lite Stik Glowing Ghost Decoration." It consists of a plastic ghost decoration, made in China, and a 4-inch lite stick in a foil wrapper, made in the U.S. These articles are exported to Hong Kong where they are blister packaged together. The consumer uses this item by placing the glowing lite stick on top of a stand inside the ghost decoration.

In HRL 555610, dated February 1, 1991, this item was held to be classifiable under subheading 9505.90.6000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other."

Issue:

Whether the "Lite Stik Glowing Ghost Decoration" is properly classified as a "festive article" under heading 9505, HTSUSA, or under the provision for "Other articles of plastics" heading 3926, HTSUSA.

Law and Analysis:

Classification of merchandise under the HTSUSA, is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN's), which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

Heading 9505, HTSUSA, includes articles which are for "Festive, carnival, or other entertainment purposes." The EN's to 9505, state that the heading covers:

> (A) Festive, carnival or other entertainment articles, which in view of their intended use are generally made of non-durable material. They include:
>
> (1) Decorations such as festoons, garlands, Chinese lanterns, etc., as well as various decorative articles made of paper, metal foil, glass fibre, etc., for Christmas trees (e.g., tinsel, stars, icicles), artificial snow, coloured bells, bells lanterns, etc. Cake and other decorations (e.g., animals, flags) which are traditionally associated with a particular festival are also classified here.
>
> * * * * * * *

Although the "Lite Stik Glowing Ghost Decoration" appears to function primarily as a decoration, we have determined that it does not meet the criteria established for classification as a "festive" article within subheading 9505.90, HTSUSA. The fact that the article is identified as a "ghost decoration" does not, in and of itself, convey the requisite association with Halloween. Ghosts and goblins are not particularly Halloween related since they often appear in mythology, movies or cartoons of no significance to Halloween.

This product is retail packaged consisting of two items: a plastic ghost and 4 inch lite stick in a foil wrapper which is intended to illuminate the ghost. The lite stick produces illumination by way of, a cyalume chemical. The lite stick, if imported separately, would be classifiable under heading 3823, HTSUSA, which provides, in pertinent part, for "chemical products and preparations of the chemical or allied industries * * * not elsewhere specified or included." The EN's to heading 3823, HTSUSA, indicate that the preparations and chemical products of this heading include, *inter alia:*

> (34) Articles producing a lighting effect by the phenomenon of chemiluminescence, e.g., lightsticks in which the lighting effect is obtained by a chemical reaction between oxalic acid type esters and hydrogen peroxide in the presence of a solvent and fluorescent compound.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRI's taken in order. Inasmuch as the product, as packaged, contains two items that may be classified under more than one heading, it is not classifiable pursuant to GRI 1. In this case, we regard the product for classification purposes as a composite good derived from the assembly of the two components, the ghost shell and the lite stick. See GRI 2(a). As a composite good, classification is determined according to GRI 3.

The text of GRI 3 provides, in pertinent part, that composite goods, made up of different components, shall be classified as if they consisted of the components which gives them their essential character. In this case, we regard the ghost component as providing the essential character of the article, following GRI 3(b) and its EN's. Therefore, our position as to which component, the ghost or the lite stick, provides the essential character has not changed from HRL 555610. However, our understanding of the correct scope of heading 9505 has changed, leading us to a different classification of the whole article.

The lite stick is intended to insert into the plastic ghost, thereby providing the plastic figurine with illumination when fully assembled. Thus, it is the plastic ghost which should govern classification of this product because the luminescent lite stick merely enhances the ghost. Further, the plastic ghost would continue to provide ornamentation after the light stick is consumed. Accordingly, the subheading which most specifically describes the assembled article is 3926.40.0000, HTSUSA, which provides for "Other articles of plastics * * * Statuettes and other ornamental articles." The EN's to heading 3926, provide that the heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14, including statuettes and other ornamental articles. Furthermore, we have already indicated that the lite stick would be classifiable in heading 3823, HTSUSA, if imported separately. When imported with the ghost, this product would not be precluded from classification under Chapter 39 pursuant to Legal Note 2(b), as a separate chemically defined organic compound classifiable under Chapter 29.

Holding:

The product identified as the "Lite-Stik Glowing Ghost Decoration" (Item No 24100) is properly classifiable within subheading 3926.40.0000, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Statuettes and other ornamental articles." This provision is dutiable under the general column one rate at 5.3 percent *ad valorem*.

HRL 555610, dated February 1, 1991, is hereby modified. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF CUSTOMS RULING RELATING TO ELIGIBILITY OF FISHING FLIES FOR DUTY ALLOWANCE UNDER SUBHEADING 9802.00.80, HTSUS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of ruling letter pertaining to the eligibility for the duty allowance under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS), of fishing flies.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying a ruling pertaining to the eligibility for the duty allowance under subheading 9802.00.80, HTSUS, of fishing flies. Notice of the proposed modification was published July 3, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 27.

EFFECTIVE DATE: Merchandise entered, or withdrawn from warehouse, for consumption on or after November 4, 1996.

FOR FURTHER INFORMATION CONTACT: Burton Schlissel, Special Classification and Marking Branch (202) 482–6945.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 3, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 27, proposing to modify NY Ruling Letter 816209 dated November 9, 1995, pertaining to the eligibility for the partial duty exemption under subheading 9802.00.80, HTSUS, of fishing flies. In that ruling, Customs held that fishing flies produced abroad from chicken feathers, thread, hooks and other materials were entitled to the partial duty exemption under subheading 9802.00.80, HTSUS.

The facts in that case involved U.S.-grown chicken capes and saddles (chicken skin) which are sent abroad with U.S.-origin thread. The foreign assembler plucks the feathers from the capes and saddles, and combines them with hooks of Japanese origin and other materials, such as fur, rabbit skins, or deer hair, to complete the fishing fly. In NY Ruling Letter 816209, Customs found that the feathers and thread were fully fabricated products of the U.S., and that the operations performed abroad which include cutting to length and trimming of the feathers were incidental to the assembly operation. Therefore, Customs held that an allowance in duty was permitted under subheading 9802.00.80, HTSUS, predicated on the cost or value of the U.S.-origin feathers and thread.

This office has reviewed NY Ruling Letter 816209 in the context of a request for reconsideration by the Port Director, Portland, Oregon, and it is our opinion that the ruling is partially in error.

Subheading 9802.00.80, HTSUS, provides a partial duty exemption for:

> Articles, except goods of heading 9802.00.90, assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in, value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process, such as cleaning, lubricating and painting.

It is Customs opinion that the U.S.-origin feathers are not "exported in condition ready for assembly without further fabrication," as required by subheading 9802.00.80, HTSUS, since the operations performed abroad include plucking the feathers from the chicken capes and saddles, before assembly with the other components. We find that this plucking operation is a process whose primary purpose is to complete the production of the feathers. *See* 19 CFR 10.14(a) and 10.16(c).

Therefore, Customs proposed in a document published in the CUSTOMS BULLETIN, Vol. 30, Number 27, to modify NY Ruling Letter 816209 to provide that the operations performed abroad include a "further fabrication" of the exported U.S.-origin feathers, and that, as a result, the allowance in duty under subheading 9802.00.80, HTSUS, will not be permitted for the cost or value of the feathers.

One comment was received in response to the notice. This commenter is of the opinion that the chicken feathers are fully formed and fabricated components when exported from the U.S., and that the task of plucking the feathers from the skin does not constitute a significant process whose primary purpose is to complete the production of the feathers within the meaning of 19 CFR 10.16(c). The commenter cites the judicial decision in *U.S. v. Texas Instruments*, CAD. 1178, 64 C.C.P.A. 24, 545 F.2d 730 (1976) and other cases in support of his position.

In *Texas Instruments* the appellate court held that scoring and breaking a silicon slice along provided so-called "streets" to separate individual transistor areas did not amount to further fabrication of the areas and, therefore, could be considered incidental to the assembly process. In that case, the dips were considered fully formed and fabricated upon exportation, although attached together on the slice.

In *E. Dillingham v. United States*, C.D. 4278, 67 Cust. Ct. 226 (1971), modified, C.A.D. 1078, 80 CCPA 39, 470 F.2d 629 (1972), fiber in baled form and fabric were exported for assembly into papermaker's felts. However, before the fibers were needled into the fabric, they were subjected to certain preparatory processing steps. Stating that "the correct starting point for the application of item 807.00 [the precursor tariff provision to HTSUS subheading 9802.00.80] must be the components as "exported," in the condition in which they leave the United States," the court found the opening, oiling, and carding operations performed on fiber exported in bulk, baled form before it met up with the fabric

component constituted "further fabrication" of the fiber within clause (a) of TSUS item 807.00, for without the performance of these operations, the en masse fiber component was not ready for assembly.

Customs concurs that the type of operations performed in *Texas Instruments* constitute operations incidental to the assembly process. *See* 19 CFR 10.16(b)(6). However, in that case and in the other cases cited in support of the commenter's position, the operations were performed on components which were fully formed and fabricated upon exportation. It is Customs' view that as in *Dillingham,* the feathers in the instant case require additional processing abroad before they are considered fully fabricated components ready for assembly. While the exported components in *Texas Instruments* are the transistors, in the subject case the exported components are the chicken capes and saddles, from which the feathers must be extricated. "Plucking" is a step which not only separates the feather's from the skins but also serves to create the component itself. Accordingly, Customs is of the opinion that the plucking operation constitutes a significant process whose primary purpose is to complete production of the feather components.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103–82, 187 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying NY Ruling Letter 816209 to reflect that the operations performed abroad constitute a further fabrication of the exported U.S.-origin feathers, and that as a result, the allowance in duty under subheading 9802.00.80, HTSUS, will not be allowed for the cost or value of, the feathers. A copy of the ruling letter modifying NY Ruling Letter 816209 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change in practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: August 7, 1996.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 7, 1996.

CLA–2 RR:TC:SM 559756 BLS
Category: Classification
Tariff No. 9802.00.80

PORT DIRECTOR
511 N.W. Broadway
Portland, OR 97209

Re: Reconsideration of NY Ruling Letter 816209; eligibility of a fishing fly for the partial duty exemption under subheading 9802.00.80, HTSUS.

DEAR SIR:

This is in reference to your memorandum dated March 20, 1996, requesting that we review NY Ruling Letter 816209 dated November 9, 1995, which held that certain fishing flies to be imported from abroad are eligible for the partial duty exemption under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

U.S.-origin chicken capes and saddles (chicken skin) and U.S.-origin thread are exported to Sri Lanka, Thailand, or India. At the country of assembly the feathers are plucked from the capes and saddles, sorted by color and size, and clipped or trimmed to aid in the assembly process. The thread and feathers are wound around a Japanese origin hook and body (fur, rabbit skins or deer hair) to form the completed fly. For some types of flies, a small amount of glue may be added to the thread after completion of the fly to make it more durable.

In NY Ruling Letter 816209, Customs found that the feathers and thread were finished products of the U.S., and that die operations performed abroad were acceptable assembly operations or operations incidental to assembly. *See* section 10.16, Customs Regulations (19 CFR 10.16). Therefore, Customs held that an allowance in duty will be permitted under subheading 9802.00.80, HTSUS, based on the cost or value of the feathers and U.S.-origin thread, upon compliance with the documentary requirements of 19 CFR 10.24.

Issue:

Whether, under the facts presented, an allowance in duty is permitted under subheading 9802.00.80, HTSUS, for the cost or value of the feathers.

Law and Analysis:

Subheading 9802.00.80, HTSUS, provides a partial duty exemption for

> Articles, except goods of heading 9802.00.90, assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process, such as cleaning, lubricating and painting.

All three requirements of subheading 9802.00.80, HTSUS, must be satisfied before a component may receive a duty allowance. An article entered under HTSUS subheading 9802.00.80 is subject to duty upon the full value of the imported article, less the cost or value of the U.S. components assembled therein, provided there has been compliance with the documentary requirements of section 10.24, Customs Regulations (19 CFR 10.24).

Section 10.14, Customs Regulations (19 CFR 10.14(a)), states in part that:

> The components must be in condition ready for assembly without further fabrication at the time of their exportation from the United States to qualify for the exemption. Components will not lose their entitlement to the exemption by being subjected to operations incidental to the assembly either before, during or after their assembly with, other components.

Section 10.16(a), Customs Regulations (19 CFR 10.16(a)), provides that the assembly operation performed abroad may consist of any method used to join or fit together solid

components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing or the use of fasteners.

Operations incidental to the assembly process are not considered further fabrication operations, as they are of a minor nature and cannot always be provided for in advance of the assembly operations. *See* 19 CFR 10.16(b). However, any significant process, operation, or treatment whose primary purpose is the fabrication, completion, physical or chemical improvement of a component precludes the application of the exemption under subheading 9802.00.80, HTSUSA, to that component. *See* 19 CFR 10.16(c).

In the instant case, the feathers are hand-plucked from the chicken capes and saddles in the foreign country before assembly with the other components. The primary purpose of this process is completion of the feather component prior to assembly with the hook, thread and other materials. In our opinion, this pre-assembly operation is a significant process which is not incidental to the assembly operation, but constitutes a finishing step in fabrication of the component, i.e., feathers. As a result, a duty allowance may not be granted upon importation of the fishing flies for the cost or value of the feathers. However, since the thread is a fully fabricated component of the U.S. at the time of exportation, an allowance in duty may be granted for the cost or value of this component, upon compliance with the documentary requirements of 19 CFR 10.24.

Holding:

Chicken leathers used in making fishing flies abroad are not in condition ready for assembly without further fabrication when exported to Sri Lanka, Thailand, or India, since the feathers must be hand-plucked in the foreign country prior to assembly. Therefore, no allowance in duty may be made for the cost or value of the feathers under subheading 9802.00.80, HTSUS. However, an allowance in duty may be made under this tariff provision for the cost or value of the U.S.-origin thread, provided the documentary requirements of 19 CFR 10.24 are satisfied. NY Ruling Letter 816209 is modified accordingly.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 96–126)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS

Court No. 92–01–00031

(Dated August 7, 1996)

ORDER

TSOUCALAS, *Judge:* Upon consideration of plaintiff's motion to lift the stay and remand this case to the Department of Commerce, International Trade Administration ("Commerce"), and upon consideration of all other related papers and proceedings, it is hereby

ORDERED that plaintiff's motion is granted and it is further

ORDERED that the stay ordered by this Court on December 28, 1994 in this action with respect to the Japanese consumption tax issue pending decision by the Court of Appeals for the Federal Circuit in *Koyo Seiko v. United States,* 63 F.3d 1572 (Fed. Cir. 1995), is hereby lifted; and it is further

ORDERED that this case is remanded to Commerce to apply the tax-neutral value added tax methodology approved by the appellate court and to recalculate the dumping margins; and it is further

ORDERED that the remand results are due within thirty (30) days from the date that this order is entered.

(Slip Op. 96–127)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS

Court No. 92–03–00163

(Dated August 7, 1996)

ORDER

TSOUCALAS, *Judge:* Upon consideration of plaintiff's motion to lift the stay and remand this case to the Department of Commerce, International Trade Administration ("Commerce"), and upon consideration of all other related papers and proceedings, it is hereby

ORDERED that plaintiff's motion is granted and it is further

ORDERED that the stay ordered by this Court on April 13, 1995 in this action with respect to the Japanese consumption tax issue pending decision by the Court of Appeals for the Federal Circuit in *Koyo Seiko v. United States*, 63 F.3d 1572 (Fed. Cir. 1995), is hereby lifted; and it is further

ORDERED that this case is remanded to Commerce to apply the tax-neutral value added tax methodology approved by the appellate court and to recalculate the dumping margins; and it is further

ORDERED that the remand results are due within thirty (30) days from the date that this order is entered.

(Slip Op. 96–128)

SHARP ELECTRONICS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–07–00384

[Defendant's motion for summary judgment is granted.]

(Dated August 12, 1996)

Donovan, Leisure, Newton & Irvine (Peter J. Gartland, Christopher P. Johnson, and *Fusae Nara)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(James A. Curley), Edward N. Maurer, Joan L. MacKenzie,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on a motion for summary judgment by plaintiff Sharp Electronics Corporation ("SEC") pur-

suant to USCIT Rule 56(a) and a cross-motion for summary judgment by defendant pursuant to USCIT Rule 56(b). Plaintiff contests the assessment of interest on the underpayment of antidumping duties applicable to television receivers that it imported from Japan between June 5, 1981 and August 28, 1989. Plaintiff argues that the assessment of interest by the United States Customs Service ("Customs") was impermissible as a matter of law because plaintiff made no cash deposits and instead, entered the merchandise under bond.

BACKGROUND

On March 8, 1971, the United States Department of Treasury ("Treasury") issued a dumping finding for television sets from Japan. *See Antidumping; Television Receiving Sets, Monochrome and Color, from Japan,* 36 Fed. Reg. 4597 ("1971 Dumping Finding"). Pursuant to the 1971 Dumping Finding, the television receivers manufactured by Sharp Corporation ("Sharp") and imported by plaintiff became subject to antidumping duties. On April 28, 1980, SEC entered into an agreement with the United States, whereby SEC settled all pending claims for antidumping duties on such television entries. Pl.'s Mot. For Summ. J. at 2. With respect to television entries subsequent to March 31, 1979, the parties agreed that the appraisement of antidumping duties and liquidation of entries would be based upon transactional data submitted by SEC and Sharp pursuant to the administrative review process of the then-recently passed Trade Agreements Act of 1979 ("the 1979 Act"). *Id.* at 3.

Prior to the enactment of the 1979 Act, importers of merchandise subject to an antidumping duty order were required only to post security for potential duties, such as bonds. *See* S. Rep. No. 249, 96th Cong., 1st Sess. at 75 (1979), *reprinted in* 1979 U.S.C.C.A.N. 461, 481. The 1979 Act, however, required importers of merchandise subject to an antidumping duty order to make a cash deposit of estimated antidumping duties and transferred responsibility for administering the antidumping duty laws from Treasury to the United States Department of Commerce ("Commerce"). For practical reasons, Treasury and Commerce decided that "[p]rior to the completion of the first administrative review of any such finding of dumping under section 751 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 * * *, merchandise subject to a finding of dumping in effect on January 1, 1980, shall continue to be entered under bond or other security." *Antidumping; Treatment of Merchandise Subject to a Finding of Dumping in Effect on January 1, 1980,* 45 Fed. Reg. 1084 (Dep't Treas. 1980). Accordingly, SEC was permitted to enter television receivers after January 1, 1980 under bonds.

On June 5, 1981, Commerce published the final results of its first administrative review of the 1971 Dumping Finding for television receivers the SEC entered between April 1, 1979 to March 31, 1980. *Television Receiving Sets, Monochrome and Color, from Japan,* 46 Fed. Reg. 30,163 (Dep't Comm. 1981) (final results). Commerce found only a

de minimis margin of 0.30 percent for televisions manufactured by Sharp. *Id.* at 30,166. As a result, Commerce stated:

> Because the weighted average margins listed above for Hitachi, *Sharp* and Mitsubishi are less than 0.5 percent and therefore *de minimis,* the Department shall not require cash deposits on those manufacturers' entries. These deposit requirements, and waiver of deposit for General, Hitachi, *Sharp* and Mitsubishi, shall remain in effect until publication of the final results of the next administrative review.

Id. at 30,166–67 (emphasis added).

On August 28, 1989, Commerce published the final results of the second administrative review that was applicable to the television receivers SEC entered between April 1, 1980 and March 31, 1981. *Television Receivers, Monochrome and Color, from Japan,* 54 Fed. Reg. 35,517 (Dep't Comm. 1989) (final results). In that review, Commerce found a margin of 0.86 percent for Sharp television receivers. *Id.* at 35,524. Accordingly, plaintiff was required for the first time to make actual cash deposits for estimated antidumping duties for its entries of Sharp televisions made on or after August 28, 1989. *See id.*

On March 11, 1992, Customs issued liquidation instructions in accordance with Commerce's final results of the administrative reviews for television receivers entered between March 1, 1987 and February 29, 1988. Pl.'s Mot. For Summ. J., Ex. B. Similarly, liquidation instructions for merchandise entered during the periods of April 1, 1981 through February 28, 1986 and March 1, 1988 through February 28, 1989 were issued on November 19, 1992. *Id.,* Ex. C. With regard to the assessment of interest, the liquidation instructions provided:

> The assessment of antidumping duties by the Customs Service is subject to the provisions of Section 778 of the Tariff Act, which requires interest on overpayments or underpayments of the amount deposited as estimated antidumping duties.

Id., Ex. B ¶ 4, Ex. C ¶ 6. Thereafter, Customs assessed interest on the underpayment of antidumping duties for plaintiff's entries. SEC objected to the assessment of interest and filed a timely protest with Customs. In response, Customs issued a Headquarters Ruling, on December 17, 1992, setting forth Commerce's interpretation of 19 U.S.C. § 1677g as follows:

> Commerce considers a *de minimis* margin to be equivalent to a zero dollar cash deposit. Although the cash deposit requirement of 0.30 percent was waived, the entry was nevertheless subject to a cash deposit requirement, albeit *de minimis,* and as such, interest would be owing to the government on any underpayment at the date of liquidation. As an antidumping duty of 38.26 percent was ultimately determined, interest is owed on the underpayment of duties on this amount deposited *(i.e.,* zero dollar) and the amount ultimately due.

Id., Ex. D at 3 (HQ Ruling 224043). Customs thus denied SEC's protest. Plaintiff subsequently filed this action.

JURISDICTION

SEC argues that the assessment of interest on antidumping duties is a protestable decision by Customs under 19 U.S.C. § 1514(a)(5) and asserts that this court thus has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a). *Id.* at 7–8 *(citing American Hi-Fi Int'l, Inc. v. United States,* Slip Op. 95–182 (Ct. Int'l Trade Nov. 16, 1995) (hereinafter *"American Hi-Fi I").* The court has recently determined that jurisdiction lies pursuant to 28 U.S.C. § 1581(i) for certain aspects of that challenge and pursuant to § 1581(a) for other aspects. *See American Hi-Fi Int'l, Inc. v. United States,* Slip Op. 96–121, at 7–13 (Ct. Int'l Trade Aug. 2, 1996) (hereinafter *"American Hi-Fi II").* As the facts and issues presented here are almost identical to those in *American Hi-Fi II,* the court adopts the reasoning therein.

DISCUSSION

SEC contests the assessment of interest on the underpayment of antidumping duties for its merchandise on essentially the same grounds as the plaintiff in *American Hi-Fi.* Like the plaintiff in *American Hi-Fi,* SEC did not make an actual cash deposit of estimated antidumping duties. Here, as in *American Hi-Fi,* this category of merchandise was originally entered under bond pursuant to the Antidumping Act of 1921, which did not require the deposit of cash for potential antidumping duties. *See American Hi-Fi II,* Slip Op. 96–121, at 2–3. Following the first administrative review, American Hi-Fi was assessed a zero cash deposit rate and thus did not make a cash deposit; rather, it entered its merchandise under the continuous importation and entry bond applicable to ordinary duties. *Id.* at 8. In the instant case, SEC was assigned an estimated deposit rate of 0.30 percent, which Commerce determined was *de minimis* and for which, no cash was required to be deposited.

The issue here, as was the case in *American Hi-Fi,* is whether Commerce may properly assess interest on the underpayment of antidumping duties under 19 U.S.C. § 1677g (1988), when no cash is deposited, but a duty order has issued for the subject product. The court finds no relevant distinction between a zero cash deposit rate and the waiver of a cash deposit for a *de minimis* margin. As there is no relevant distinction between the facts of *American Hi-Fi* and the instant case and the parties make essentially the same arguments raised in *American Hi-Fi II,* the court adopts the reasoning in that case and holds that Commerce properly assessed interest on SEC's entries. *See American Hi-Fi II,* Slip Op. 96–121, at 16–19.

Accordingly, summary judgment is granted for defendant.

(Slip Op. 96–129)

INTERCARGO INSURANCE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–05–00269

[Plaintiff's motion for rehearing denied.]

(Dated August 12, 1996)

Hodes & Pilon (Wayne Jarvis, Michael G. Hodes, and *James L. Sawyer),* for the plaintiff. *Frank W. Hunger,* Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Rhonda K. Schnare),* for the defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Chief Judge:* Intercargo Insurance Company, a corporate surety, provides customs bonds in the customs territory of the United States. Intercargo filed a complaint alleging, *inter alia,* the United States Customs Service regulation regarding delinquent sureties, 19 C.F.R. § 113.38 (1994), violates due process and is subject to the statute of limitations.

Defendants moved to dismiss claiming a lack of jurisdiction based on standing, ripeness, and finality of agency action. Intercargo argued that the notices Customs sent to Intercargo pursuant to 19 C.F.R. § 113.38 constituted an imminent threat of sanctions through nonacceptance of Intercargo's bonds at the district, regional, and national levels, and would entitle it to pre-enforcement review. Upon consideration of these motions, this court granted defendant's motion to dismiss. *Intercargo Ins. Co. v. United States,* 912 F. Supp. 544 (Ct. Int'l Trade 1995).

DISCUSSION

By the present motion, Intercargo seeks a rehearing of the court's decision pursuant to Rule 59 of this court. Intercargo claims: (1) that the court's refusal to permit discovery or conduct an evidentiary hearing constituted a significant flaw in the proceedings, and (2) that the court's denial of Intercargo's partial summary judgment motion was improper.

Rule 59(a) of this court permits a rehearing for any of the reasons for which rehearings are granted in suits in equity in United States courts, USCIT R. 59(a), and the court may use its sound discretion in deciding whether to grant or deny a motion for a rehearing, USCIT R. 59(a); *Xerox Corp. v. United States,* Slip. Op. 96–107 at 2 (Ct. Int'l Trade July 9, 1996).

The purpose of a rehearing is not to relitigate a case. *BMT Commodity Corp. v. United States,* 674 F. Supp. 868, 869 (Ct. Int'l Trade 1987), *aff'd per curiam,* 852 F.2d 1285 (Fed. Cir. 1988), *cert. denied,* 489 U.S. 1012 (1989). Rather, a court will grant a rehearing only under certain limited circumstances. These circumstances include where the original proceeding suffered from: (1) an error or irregularity; (2) a serious eviden-

tiary flaw; (3) the absence of new evidence which even a diligent party could not have discovered in time; or (4) an accident, unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case. *Xerox,* Slip Op. 96–107 at 2–3 *(citing Kerr-McGee Chem. Corp. v. United States,* 14 Ct. Int'l Trade 582, 583 (1990)). Further, the court will not disturb its previous decision unless it is manifestly erroneous. *United States v. Gold Mountain Coffee, Ltd.,* 601 F. Supp. 212, 214 (Ct. Int'l Trade 1984) (citing *Quigley & Manard, Inc. v. United States,* 496 F.2d 1214 (C.C.P.A. 1974)). With these standards in mind, the court turns to Intercargo's arguments.

A. *Intercargo's Discovery Requests:*

Intercargo argues that the court's refusal to permit discovery or conduct an evidentiary hearing constituted a significant flaw in the proceedings. According to Intercargo, the court's Scheduling Order stayed discovery pending a ruling on initial dispositive motions, and therefore, forced Intercargo to oppose the Government's Motion to Dismiss based solely upon the notices issued by Customs under subsection 113.38(c)(4). By placing a heavy burden on the surety to demonstrate that its losses were sufficient for pre-enforcement review, Intercargo argues this court treated the government's Motion to Dismiss as a motion for summary judgment. Intercargo contends that discovery is necessary to expose fully the imminence of the injury it faces from Customs. Intercargo notes that Customs has continued to send it notices threatening sanction pursuant to 19 C.F.R. § 113.38(c)(4).

Intercargo alleged two types of injury. First, that Customs' notices threatening sanctions issued pursuant to 19 C.F.R. § 113.38(c)(4) (1994) were "concrete and particularized" and demonstrated that Intercargo was "one day away" from being sanctioned. *Intercargo,* 912 F. Supp. at 546. Such sanctions, according to Intercargo, would be disastrous for the company. (Compl. ¶ 30.) Second, Intercargo contended that responding to the (c)(4) notices consumed significant resources and had placed a substantial burden on the surety. *Id.*

The court accepted Intercargo's general factual allegations as true, but found that Intercargo purported no allegations outside the issuance of subsection 113.38(c)(4) notices to demonstrate the imminence of Customs' sanctions. *Intercargo,* 912 F. Supp. at 546. The court therefore granted defendant's Motion to Dismiss. *Cf. Schering Corp. v. United States,* 626 F.2d 162, 167 (C.C.P.A. 1980) (finding no error in Customs Court's ruling denying rehearing absent facts in either importer's response to cross motion to dismiss or its motion for rehearing which would establish jurisdiction). The court did not, *sua sponte,* transform the government's motion into a motion for summary judgment, as Intercargo could not demonstrate its entitlement to pre-enforcement review.

Subsection (c)(4) letters merely present *notice* that Customs officials could refuse to accept the bonds of a delinquent surety at the district, regional, or national level, 19 C.F.R. § 113.38(c)(4), and, further, "pro-

vide an opportunity for resolution of outstanding debts." 19 C.F.R. § 113.38(c)(5); *Intercargo,* 912 F. Supp. at 546. Nonetheless, the sanctions threatened in the notices are within Customs' discretion and take effect *only* after review, final decision, and written notice by the appropriate Customs official pursuant to subsection 113.38(c)(5). *Intercargo,* 912 F. Supp. at 546–48.

By the terms of the regulation, Customs cannot sanction Intercargo without following certain prescribed procedures. Customs has yet to take such steps. Thus, even if the court accepts Intercargo's allegations that it has received subsection 113.38(c)(4) notices, feels threatened by the potential sanctions, and is heavily burdened in responding to the notices, Customs has not committed any act demonstrating that sanctions are imminent. Until Customs issues Intercargo a notice pursuant to subsection 113.38(c)(5) (establishing effective date for sanctions), the court cannot speculate that Customs will ever sanction Intercargo. For this reason, the additional (c)(4) letters that Customs has sent Intercargo do not alter the reality that Customs has not made a decision to sanction Intercargo, and has not commenced the procedures mandated by the regulations necessary to do so.

Discovery, therefore, would not aid Intercargo in its attempt to demonstrate its entitlement to pre-enforcement review, because Customs is still bound to abide by its regulations. The indisputable fact remains that Customs' intent is of little significance if Customs has not issued notice pursuant to subsection 113.38(c)(5) that it will impose sanctions. Even if certain evidence exists that would clarify Customs' intent, Customs must still follow the procedures established by the regulations, and given its discretion, Customs is free to change its position at any time. After discovery, Intercargo would not be any closer to meeting the requirements for pre-enforcement review. Although Intercargo alleges the court has made improper findings of fact in granting defendant's Motion to Dismiss, Intercargo, in actuality, is demanding that the court accept its conclusions of law as general factual allegations. The court's findings that Customs' (c)(4) letters do not constitute an imminent threat were conclusions of law based on the court's reading of the plain language of the regulation.

Finally, although Intercargo has expended time and costs in responding to these letters and was concerned about the effect of sanctions on its reputation, this court's previous opinion has noted that such transactions and Intercargo's concerns are not "outside of Intercargo's ordinary responsibilities as a surety," because resolution of such debts at the administrative level would further the goals of judicial efficiency and serves the administrative process. *Intercargo,* 912 F. Supp. at 546; *cf. Gardner v. Toilet Goods Ass'n, Inc.,* 387 U.S. 167, 172–73 (finding $49,000,000 cost for compliance as substantial hardship). Although the court assumed Intercargo's general allegations of fact in its Complaint

were true,[1] the court found these allegations did not warrant the court's premature examination of the claim. *Gardner*, 387 U.S. at 172 (finding burden for pre-enforcement review substantial). Accordingly, the court did not improperly dismiss Intercargo's factual allegations as untrue, but rather found them insufficient to meet the hardship threshold for pre-enforcement review. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967) (finding that pre-enforcement review threshold requirements prevent courts from entangling themselves in abstract disagreements over administrative policies.)

B. *Intercargo's Motion for Summary Judgment:*

Intercargo also contends that the court's denial of its Motion for Partial Summary Judgment motion was improper. According to Intercargo, it never fully briefed its partial summary judgment motion because the court stayed the government's response to the motion. Moreover, Intercargo claims that court did not consider its Motion for Partial Summary Judgment at oral argument or address the motion's merits. As such, Intercargo contends the court must amend the conclusion to its prior opinion to efface the court's denial of its motion.

The court disagrees. Intercargo's Motion for Partial Summary Judgment was properly denied because the surety's lack of standing, as discussed *supra* in part A, rendered its motion moot. Accordingly, the court's denial of the motion (in the opinion's conclusion) followed naturally from granting defendant's Motion to Dismiss, because Intercargo no longer had an action upon which to rest its motion.

CONCLUSION

Intercargo has failed to satisfy the requirements for a rehearing. Accordingly, Intercargo's Motion for Rehearing is denied.

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[1] In ruling upon a Motion to Dismiss, the court is "required to accept as true all material allegations of the *complaint*." *McKinney v. United States Dep't of Treasury*, 799 F.2d 1544, 1558 (Fed. Cir. 1986) (citations omitted) (emphasis added). Further, "the complaining party must set forth the claims of injury and other [C]onstitutional and prudential requirements of standing with some specificity and concreteness." *Id.* In its Complaint, Intercargo did not allege that responding to the notices has been burdensome, or even that the *issuance* of a (c)(5) notice would necessarily effect its operations. Intercargo's Complaint only alleges that

> If Customs is permitted to continue threatening Intercargo under the amorphous standards and purported authority of Section 113.38, Intercargo will wrongfully be required to conduct its business affairs in an atmosphere of constant fear and uncertainty. More significantly, if Customs is permitted to *refuse to accept* Intercargo's bonds under Section 113.38, it will have a substantial, detrimental effect upon Intercargo's reputation and business operations, resulting in immediate, irreparable injury, loss and damage without adequate remedy at law.

(Complaint ¶ 30) (emphasis added). Although the Complaint discusses what would happen if Customs' actually refused Intercargo's bonds, Intercargo would still be able to contest Customs' sanction action by seeking a temporary restraining order to restrict Customs.

(Slip Op. 96–130)

BRITISH STEEL PLC, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00550–CVD

USINAS SIDERURGICAS DE MINAS GERAIS, S.A., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00558–CVD

INLAND STEEL INDUSTRIES, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00567–CVD

LTV STEEL CO., INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00568–CVD

LACLEDE STEEL CO., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00569–CVD

LUKENS STEEL CO., INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00570–CVD

AG der Dillinger Hüttenwerke challenges Commerce's second remand determination on the issue of privatization as it pertains to *Certain Steel Products from Germany,* 58 Fed. Reg. 37,315 (Dep't Comm. 1993) (final determ.). Domestic Producers AK Steel Corporation, Bethlehem Steel Corporation, Geneva Steel, Gulf States Steel Incorporated of Alabama, Inland Steel Industries, Incorporated, Laclede Steel Company, LTV Steel Company, Incorporated, Lukens Steel Company, National Steel Corporation, Sharon Steel Corporation, U.S. Steel Group a Unit of USX Corporation, and WCI Steel, Incorporated support Commerce's second remand determination. Additionally, Domestic Producers and AG der Dillinger Hüttenwerke have both filed a motions for judgment on the agency record in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD.

Held: (1) Commerce's second remand determination is supported by substantial evidence and is otherwise in accordance with law; (2) Domestics' arguments on the issue of privatization in their country-specific motion for judgment on the agency record filed in *LTV Steel Co., Inc., et al. v. United States,* Consol. Court No. 93–09–00568–CVD, are subsumed by Domestics' comments on the second remand determination; (3) regarding Dillinger's arguments in its country-specific motion for judgment on the agency record filed in *LTV Steel Co., Inc., et al. v. United States,* Consol. Court No. 93–09–00568–CVD, (a) the Court finds Dillinger's argument concerning the application of the privatization methodology in the *German Final Determination* is moot, and (b) the Court rejects the remainder of Dillinger's arguments; (4) the Court will enter final judgment pursuant to Rule 54(b) in *LTV Steel Co., Inc., et al. v. United States,* Consol. Court No. 93–09–00568–CVD, consisting of *LTV Steel Co., Inc., et al. v. United States,* Court No. 93–09–00568–CVD, *Thyssen Stahl AG, et al. v. United States,* Court No. 93–09–00585–CVD, *AG der Dillinger Hüttenwerke v. United States,* Court No. 93–09–00596–CVD, and *Fried. Krupp AG Hoesch-Krupp and Krupp Hoesch Stahl AG v. United States,* Court No. 93–09–00603–CVD, as to (a) counts I, II, and III in the complaint of the Domestic Producers who filed a complaint in *LTV Steel Co., Inc. v. United States,* Court No. 93–09–00568–CVD, and (b) the complaint of *Dillinger filed under AG der Dillinger Hüttenwerke v. United States,* Court No. 93–09–00596–CVD.

(Dated August 13, 1996)

Regarding *British Steel plc v. United States*, Consol. Court No. 93–09–00550–CVD: *Steptoe & Johnson (Richard O. Cunningham, Peter Lichtenbaum), (Sheldon E. Hochberg, William L. Martin, II)*, on brief, *(Richard O. Cunningham, Sheldon E. Hochberg)*, on oral argument, Counsel for British Steel plc; *Morgan, Lewis & Bockius (Mark R. Joelson), (Marcela B. Stras, Roger C. Wilson)*, on brief, Counsel for the Government of the United Kingdom, *et al.; Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, Thomas R. Howell, Martha J. Talley, John A. Ragosta, Guy C. Smith, John R. Magnus, Jeffrey D. Nuechterlein, Philip Karter, Michael R. Geroe, Jennifer Danner Riccardi)*, on brief, *(Martha J. Talley, John A. Ragosta)*, on oral argument, Counsel for Geneva Steel, *et al.; Skadden, Arps, Slate, Meagher & Flom (John J. Mangan, Robert E. Lighthizer), (D. Scott Nance, Barry J. Gilman)*, on brief, *(D. Scott Nance, Barry J. Gilman)*, on oral argument, Counsel for Geneva Steel, *et al.*

Regarding *Usinas Siderurgicas de Minas Gerais, S.A.*, et al. *v. United States*, Consol. Court No. 93–09–00558–CVD: *Willkie Farr & Gallagher (Christopher S. Stokes), (William H. Barringer, Nancy A. Fischer)*, on brief, *(Christopher S. Stokes)*, on oral argument, Counsel for USIMINAS; *Dickstein Shapiro & Morin (Arthur J. Lafave, III, Douglas N. Jacobson)*, Counsel for Companhia Siderurgica Nacional; *Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer, John J. Mangan), (Barry J. Gilman, D. Scott Nance)*, on brief, *(Barry J. Gilman, Scott Nance)*, on oral argument, Counsel for Gulf States Steel, Inc., *et al.; Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, John A. Ragosta, Guy C. Smith, Michael R. Geroe)*, on brief, *(John A. Ragosta)*, on oral argument, Counsel for Gulf States Steel, Inc., *et al.*

Regarding *Inland Steel Industries, Inc.*, et al. *v. United States*, Consol. Court No. 93–09–00567–CVD: *Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, Martha J. Talley, John A. Ragosta, John R. Magnus, Jeffrey D. Nuechterlein, Jennifer Danner Riccardi)*, on brief, *(Martha J. Talley, John A. Ragosta, John R. Magnus)*, on oral argument, Counsel for Inland Steel Indus., Inc., *et al.; Skadden, Arps, Slate, Meagher & Flom (John J. Mangan, Robert E. Lighthizer), (D. Scott Nance)*, on brief, *(Barry J. Gilman, D. Scott Nance)*, on oral argument, Counsel for Inland Steel Indus., Inc., *et al.; Weil, Gotshal & Manges LLP (Stuart M. Rosen), (M. Jean Anderson, Jeffrey P. Bialos, Diane M. McDevitt, Scott Maberry;* and *Stuart M. Rosen, Mark F. Friedman, Jonathan Bloom)*, on brief, *(M. Jean Anderson, Stuart M. Rosen)*, on oral argument, Counsel for Usinor Sacilor, Sollac and GTS.

Regarding *LTV Steel Co., Inc.*, et al. *v. United States*, Consol. Court No. 93–09–00568–CVD: *Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, Martha J. Talley, John A. Ragosta, Guy C. Smith, O. Julia Weller, Kristen M. Neller, Michael R. Geroe)*, on brief, *(John A. Ragosta, Guy C. Smith)*, on oral argument, Counsel for LTV Steel Co., *et al.; Skadden, Arps, Slate, Meagher & Flom (John J. Mangan, Robert E. Lighthizer), (D. Scott Nance)*, on brief, *(D. Scott Nance)*, on oral argument, Counsel for LTV Steel Co., *et al.; Sharretts, Paley, Carter & Blauvelt, P.C. (Gail T. Cumins)*, Counsel for Thyssen Stahl AG, *et al.; LeBoeuf, Lamb, Greene & MacRae, L.L.P. (Pierre F. de Ravel d'Esclapon, Mary Patricia Michel)*, Counsel for AG der Dillinger Hüttenwerke; *Hogan & Hartson (Lewis E. Leibowitz, Steven J. Routh, Paul Minorini)*, Counsel for Fried, Krupp AG Hoesch-Krupp, *et al.*

Regarding *Laclede Steel Co.*, et al. *v. United States*, Consol. Court No. 93–09–00569–CVD: *Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, Martha J. Talley, John A. Ragosta, Linda C. Menghetti, Jeffrey D. Nuechterlein, Jennifer Danner Riccardi)*, on brief, *(John A. Ragosta, Jeffrey D. Nuechterlein, Jennifer Danner Riccardi)*, on oral argument, Counsel for Laclede Steel Co., *et al.* Armco Steel Co., *et al.* and Bethlehem Steel Corp., *et al.; Skadden, Arps, Slate, Meagher & Flom (John J. Mangan, Robert E. Lighthizer), (D. Scott Nance)*, on brief, *(D. Scott Nance)*, on oral argument, Counsel for Laclede Steel Co., *et al.*, Armco Steel Co., *et al.*, and Bethlehem Steel Corp., *et al.; Morrison & Foerster (Donald B. Cameron), (Julie C. Mendoza, Craig A. Lewis, Sue-Lynn Koo, Panagiotis C. Bayz)*, on brief, *(Donald B. Cameron, Julie C. Mendoza)*, on oral argument, Counsel for Dongbu Steel Co., *et al.*

Regarding *Lukens Steel Co.*, et al. *v. United States*, Consol. Court No. 93–09–00570–CVD: *Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, Martha J. Talley, John A. Ragosta, Guy C. Smith, Scott L. Forseth, Michael R. Geroe)*, on brief, *(John*

A. Ragosta), on oral argument, Counsel for Lukens Steel Co., *et al.; Skadden, Arps, Slate, Meagher & Flom (John J. Mangan, Robert E. Lighthizer), (D. Scott Nance),* on brief, *(D. Scott Nance),* on oral argument, Counsel for Lukens Steel Co., *et al.; Shearman & Sterling (Jeffrey M. Winton), (Robert E. Herzstein, Shavit Matias),* on brief, Counsel for Altos Hornos de Mexico, S.A. de C.V.

Regarding *Geneva Steel,* et al. *v. United States,* Consol. Court No. 93–09–00566–CVD: *Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, Martha J. Talley, John A. Ragosta, Michael R. Geroe),* on brief, *(Martha J. Talley, Michael R. Geroe),* on oral argument, Counsel for Geneva Steel, *et al.; Barnes, Richardson & Colburn (Gunter von Conrad),* Counsel for Fabrique de Fer Charleroi, S.A.; *LeBoeuf, Lamb, Greene & MacRae (Melvin S. Schwechter),* Counsel for S.A. Forgess de Clabecq; *O'Melveny & Myers (Peggy A. Clarke, Gary N. Horlick),* Counsel for Sidmar N.V. and TradeARBED, Inc.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(A. David Lafer) (Jeffrey M. Telep, Velta A. Melnbrencis); Stephen J. Powell, (Terrence J. McCartin, Robert E. Nielsen, David W. Richardson, Elizabeth C. Seastrum, Marguerite Trossevin, Jeffrey C. Lowe),* Office of Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, Counsel for defendant.

OPINION

CARMAN, *Judge:* In *British Steel plc v. United States,* 924 F. Supp. 139 (CIT 1996) *(British Steel II), appeals docketed,* Nos. 96–1401–06, (Fed. Cir. June 21, 1996), this Court stayed its consideration of the Department of Commerce's ("Department" or "Commerce") first privatization remand, *Final Results of Redetermination Pursuant to Court Remand on General Issue of Privatization* (dated July 17, 1995) *(Privatization Remand),* as it pertained to *Certain Steel Products From Germany,* 58 Fed. Reg. 37,315 (Dep't Comm. 1993) (final determ.) *(German Final Determination),* and of all issues related to or dependent upon privatization in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD, consisting of *LTV Steel Co., Inc.,* et al. *v. United States,* Court No. 93–09–00568–CVD, *Thyssen Stahl AG,* et al. *v. United States,* Court No. 93–09–00585–CVD, *AG der Dillinger Hüttenwerke v. United States,* Court No. 93–09–00596–CVD, and *Fried. Krupp AG Hoesch-Krupp and Krupp Hoesch Stahl AG v. United States,* Court No. 93–09–00603–CVD, pending this Court's jurisdiction pursuant to the remand from the Court of Appeals in *Saarstahl AG v. United States,* 78 F.3d 1539 (Fed. Cir. 1996), *rev'g and remanding Saarstahl, AG v. United States,* 858 F. Supp. 187 (CIT 1994). Through an April 30, 1996 order, in light of the petition for rehearing before the Court of Appeals in *Saarstahl*[1] *and in the interest of expedition, this Court vacated the stay. In the same order, this Court also ordered Commerce to perform a second remand determination on privatization issues pertaining to the German Final Determination.* The present opinion addresses the second remand determination, *Final Results of Redetermination Pursuant to Court Remand on Certain Factual Issues Regarding the Privatization in Germany* (dated May 22, 1996) *(Redetermination),* as well as all country-specific challenges related to privatization presented in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD. This Court has jurisdiction over this matter under 28 U.S.C. § 1581(c) (1988).

[1] The Court of Appeals has since denied the petition for rehearing, and has issued a mandate on *Saarstahl.*

APPLICATION OF U.S. CIT R. 54(b)

U.S. CIT R. 54(b) provides in part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

As explained by the Court,

> Underlying rule 54(b) is the recognition that with the liberal joinder of claims now permitted by the federal rules, the policy against piecemeal appellate review implicit in the "single judicial unit" rule must be weighed against the prejudice caused by unjustified delay which can occur when decisions final as to some claims cannot be entered until the litigation is final as to all claims. In other words, a claim may be certified for appeal under rule 54(b) if a decision on that claim represents a "final decision" in the sense of an ultimate disposition of an individual claim entered in the course of a multiple claim action and if there is no just reason for delay.

Timken Co. v. Regan, 5 CIT 4, 6 (1983) (citation omitted).

In accordance with a February 18, 1994, scheduling order in this proceeding, parties were jointly ordered to brief five general issues involved in various groupings of the consolidated cases under review. *See British Steel II*, 924 F. Supp. at 147, 151. That scheduling order also set forth a schedule for the parties to submit individual briefs on a country-specific basis. Privatization issues were raised in several of the complaints and country-specific briefs, including two of the complaints in *LTV Steel Co., Inc.*, et al. *v. United States*, Consol. Court No. 93–09–00568–CVD. The present opinion will result in the final resolution of all issues presented in Commerce's *Redetermination* as well as all country-specific challenges related to privatization presented in *LTV Steel Co., Inc.*, et al. *v. United States*, Consol. Court No. 93–09–00568–CVD.

The Court will enter final judgment using Rule 54(b) for purposes of rendering claims related to privatization immediately appealable. Specifically, the Court will enter final judgment pursuant to Rule 54(b) in the country-specific case *LTV Steel Co., Inc.*, et al. *v. United States*, Consol. Court No. 93–09–00568–CVD, as to: (1) counts I, II, and III in the complaint of AK Steel Corporation, Bethlehem Steel Corporation, Geneva Steel, Gulf States Steel, Incorporated of Alabama, Inland Steel Industries, Incorporated, Laclede Steel Company, LTV Steel Company, Incorporated, Lukens Steel Company, National Steel Corporation, Sharon Steel Corporation, U.S. Steel Group a Unit of USX Corporation, and WCI Steel, Incorporated (collectively "Domestic Producers") filed in *LTV Steel Co., Inc. v. United States*, Court No. 93–09–00568–CVD; and (2) the complaint of Dillinger filed under *AG der Dillinger Hüttenwerke*

v. United States, Court No. 93–09–00596–CVD. This Court's decision resolving these privatization issues is a decision upon cognizable claims for relief.

Having determined that this Court is dealing with a "final judgment" on specific claims, the Court now determines that the final judgment on the above-specified counts in the Domestic Producers' complaint, and the entire complaint of Dillinger, in country-specific *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD, are immediately appealable under Rule 54(b). *See Timken,* 5 CIT at 6. There is no just reason for delay. This Court's decision in *British Steel II,* which ruled upon privatization issues affecting other cases in the joint proceeding, is currently on appeal before the Court of Appeals. The parties and this Court have spent a great deal of time and other resources sifting through the privatization issues in all of these cases. In the interest of conserving judicial and the parties' resources, the Court finds it more desirable that, if further issues of privatization are to be appealed, they are appealed by as many affected parties as possible, and as concurrently as possible with this Court's prior decisions on these issues.

In two distinct sections of the present opinion, this Court will address the *Redetermination* and then all country-specific issues related to privatization in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD. Country-specific issues raised in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD, that are not dependent in any way on privatization will be addressed in a future, separate opinion.[2]

Standard of Review

In reviewing determinations and remand determinations by Commerce, this Court will hold unlawful those found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988) (current version at 19 U.S.C. § 1516a(b)(1)(B)(i) (1994)).

I. *Commerce's Redetermination:*

Background

By order dated April 30, 1996, this Court ordered Commerce to: (1) set forth Commerce's factual findings on the *entire* transaction at issue in the *German Final Determination,* which resulted in DHS-Dillinger Hütte Saarstahl's (DHS) ownership of AG der Dillinger Hüttenwerke (Dillinger) and Saarstahl AG (SAG), with clarity, finality, and a more thorough and comprehensive explanation than was provided in Commerce's *Privatization Remand* discussed in *British Steel II;* (2) determine to whom the subsidies at issue were provided; (3) if an enterprise to whom subsidies were provided was subsequently privatized, explain

[2] In setting oral argument on non-privatization issues in *LTV Steel Co., Inc.* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD, this Court ordered that "no party shall present oral argument, at the November 9, 1995 hearing, on any issue that could be mooted by, or otherwise depends upon, the outcome of the general issue of privatization." *See LTV Steel Co., Inc.* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD (Nov. 7, 1995) (order).

whether that enterprise continued to be, for all intents and purposes, the same enterprise after the privatization such that Commerce may continue to countervail that entity, as discussed in *British Steel plc v. United States,* 879 F. Supp. 1254 (CIT 1995) *(British Steel I), appeals docketed,* Nos. 96–1401–06, (Fed. Cir. June 21, 1996), and *British Steel II;* (4) if parties to the transaction at issue discounted any aspects of purchase price to account for countervailing duty liability, as discussed in *British Steel II,* explain this and its effect on the transaction and the outcome of countervailing duty liability for the parties involved, and explain Commerce's statutory authority permitting such findings; (5) explain Commerce's statement in its first remand on privatization at page 21 n.37 that "because DHS owned SAG, the former SVK/DHS's assets and liabilities remained with DHS, albeit indirectly, even after the transfer of the assets and liabilities of the former SVK/DHS to the newly-created SAG"; (6) determine whether Commerce may properly countervail DHS, Dillinger, SAG, or any other party as a result of the transaction at issue; (7) if Commerce determines that DHS was provided with subsidies but that Dillinger and/or SAG are somehow liable for those subsidies, explain why this is so and under what authority Commerce may countervail Dillinger and/or SAG for subsidies provided to DHS. *See British Steel plc v. United States,* Consol. Court No. 93–09–00550–CVD at 3–4 (Apr. 30, 1996) (order).

In the *Redetermination,* Commerce concludes it may properly countervail Dillinger for the full amount of subsidies received prior to the privatization transaction at issue in the *German Final Determination. Redetermination* at 1. In so doing, Commerce sets forth a description of the transaction at issue as follows. Prior to 1989, the Governments of Germany and Saarland provided "massive amounts of assistance" to a company named Saarstahl Volkingen GmBH (SVK) "and its predecessor companies." *Id.* at 5. Repayment was contingent upon SVK's return to profitability.

In April 1989, the Government of Saarland (GOS) owned 76 percent of SVK, and Arbed, a Luxembourg company, owned 24 percent. On April 20, 1989, the GOS and Arbed agreed with Usinor Sacilor, a company owned by the French government, to combine SVK with another German steel producer owned by Usinor Sacilor, Dillinger.[3] Two independent accounting firms appraised the relative values each party would contribute to the combined entity in order to determine each party's percentage share of ownership in the newly-combined entity. The Governments of Germany and Saarland forgave all of the outstanding debts owed to them by SVK on June 14, 1989, as a precondition to the com-

[3] In the *Redetermination,* Commerce refers to "AG der Dillinger Huttenwerke" as "Dillinger," but also abbreviates "Dillinger Huttenwerke" as "Dillinger." This Court will assume that all of Commerce's references to "Dillinger" are references to AG der Dillinger Hüttenwerke.

bination of SVK and Dillinger. In addition, private creditors forgave a portion of the debt SVK owed to them.[4]

> [O]n June 15, 1989, a series of events occurred. First, SVK's name was changed to DHS Dillinger Hutte Saarstahl AG (DHS), and its legal form was changed from GmBH (a limited liability corporation) to AG (a German stock company), so that DHS could issue stock. These change had no impact on the assets and remaining liabilities of SVK, *i.e.*, all assets and liabilities of SVK (including SVK's tax loss carryforward) continued to reside in DHS.
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> Then, the stated capital of the company now called DHS was reduced from DM 330 million to DM 12.5 million. The stated capital was reduced to cover accumulated losses of SVK. However, the relative ownership percentages of GOS (76 percent) and Arbed (24 percent) remained the same. The ownership interests of GOS and Arbed represented DM 9.5 million and DM 3 million of the company's stated capital, respectively.
>
> Next, * * * the stated capital of DHS was increased to DM 300 million. The increase in the company's stated capital was based on the contributions to be made by the GOS, Usinor Sacilor and Arbed. The GOS provided a cash contribution of DM 145.1 million, in addition to its existing DM 9.5 million of DHS's stated capital. This cash contribution of DM 145.1 million was divided as follows: DM 73 million in stated capital and DM 72.1 million in surplus capital. Arbed, along with its existing DM 3 million of stated capital, made an additional cash contribution of DM 8.9 million (DM 4.5 million as stated capital and 4.4 million as surplus capital). Usinor Sacilor made an in-kind contribution into DHS consisting of its shares of Dillinger. Usinor Sacilor's contribution in kind was valued at DM 417.3 million; DM 210 million went into stated capital and 207.3 into surplus capital.

Id. at 6–7 (footnote omitted). Subsequent to the parties' contributions, the GOS owned 27.5 percent of DHS, Usinor Sacilor owned 70 percent, and Arbed owned 2.5 percent. DHS issued non-transferrable shares to the GOS, Arbed, and Usinor Sacilor based on the amount each had contributed towards the stated capital of DHS.

Subsequently on June 30, 1989, DHS transferred all assets, except for the tax loss carryforward, "and liabilities of the former SVK into a newly created, 100 percent owned, corporate subsidiary, Saarstahl AG (SAG). Thus, DHS became a holding company with two operating subsidiaries, SAG and Dillinger." *Id.* at 8.[5] Under "profit and loss agreements" both subsidiaries signed with DHS, DHS held ultimate management authority, all profits were to be transferred to DHS, and DHS would assume any current year losses. This transaction, combining SVK and DHS,

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[4] Commerce elaborates on the debt forgiveness as follows:

> The debt forgiveness of the two governments and the private creditors was the subsidy found by the Department to have been bestowed upon SVK. Dillinger received benefits directly under the Capital Investment Grants program and the Investment Promotion Act. The SVK debt forgiveness accounted for the vast proportion of the final rate calculated in the *Privatization Remand*. Without inclusion of the debt forgiveness, Dillinger's rate would be *de minimis*.

Redetermination at 6 n.2.

[5] Commerce reports "DHS owned 100 percent of SAG and 95 percent of Dillinger." *Redetermination* at 8 n.6.

"was designed so that the tax loss carryforward previously generated by SVK would continue to benefit DHS even after the combination with Dillinger and the creation of SAG." *Id.* (footnote omitted).

Commerce determines in the *Redetermination* that SVK was partially privatized after the events of June 15, 1989.[6] This partial privatization "was neither a sale of assets nor a simple stock sale. Rather, the privatization of SVK was achieved by means of a combination with another corporation and the exchange of stock." *Id.* at 7–8 (footnote omitted). Commerce concludes

> the privatization of SVK was, in essence, a two-step process. Pursuant to the first step of the transaction, SVK's name was changed to DHS and it became a stock company. SVK's assets, rights and liabilities simply became the assets, rights and liabilities of DHS. In the second step of the transaction, DHS was combined with Dillinger.

Id. at 9.

On the issue of to whom the subsidies in question were provided, Commerce determines that the Governments of Germany and Saarland's and private banks' forgiveness of debt owed to them by SVK in 1989 constitutes a subsidy: "Because this debt forgiveness was specific to an enterprise and bestowed a benefit, the Department determined that a countervailable subsidy was provided * * *. [T]his subsidy was 'provided to,' and received by, SVK * * *." *Id.* Commerce further explains, the day after this subsidy was provided to SVK, SVK was privatized:

> In the first step of the privatization transaction, SVK simply changed its name to DHS and its corporate form from GmBH (a limited liability corporation) to AG (a German stock company), so that it could issue stock. As discussed in the *Privatization Remand,* we have determined DHS, for all intents and purposes, to be the same as SVK, the entity which received the subsidies.

Id. at 9–10 (footnotes omitted). Commerce further explicates this point as follows:

> Based on our analysis of the transaction * * * we determine that DHS/Dillinger—the post-privatization entity—remained for all intents and purposes the same entity as SVK/DHS—the pre-privatization entity which received the subsidy. Pursuant to the second step of the transaction, the GOS exchanged its interests in SVK/DHS for a minority equity position in DHS/Dillinger. Usinor Sacilor exchanged its interest in Dillinger for a majority equity interest in DHS/Dillinger. Thus, while the identity of the shareholders who held ownership interests in DHS/Dillinger, as well as the relative shareholdings of pre-privatization shareholders, differed from those in SVK/DHS, there was no change in DHS/Dillinger's corpo-

[6] Commerce explains that "[f]or purposes of this remand, * * * partial privatization refers to a privatization in which the government continues to maintain an ownership interest in the corporate entity in question post-privatization." *Redetermination* at 7 n.4 (citations omitted).

> rate identity. The fact that DHS/Dillinger subsequently held the shares of Dillinger does not alter the fact that DHS/Dillinger is, for all intents and purposes, the same entity that received the subsidies, SVK/DHS. The contribution of assets to a corporation in exchange for shares of the corporation does not alter the corporate identity. Most importantly, all of SVK/DHS's assets and liabilities remained, directly or indirectly, with DHS/Dillinger.

Id. at 10–11 (footnote omitted).[7] Commerce adds that the transaction was designed to allow the tax loss carryforward to continue to benefit DHS after the combination with Dillinger. Under German income tax law, DHS, not SAG, is SVK's successor company. Additionally, "under German income tax law, a condition of eligibility for a tax loss carryforward is the 'corporation's legal and financial identity with the corporation that incurred the losses.'" *Id.* at 12 (footnote omitted).

As to whether parties to the transaction discounted any aspect of the purchase price to account for countervailing duty liability, Commerce explains that while this issue was not specifically pursued during the underlying investigation, "nothing contained in the appraisal report of the independent accounting firm * * * indicates that any of the parties explicitly took into account a future potential countervailing duty liability." *Id.* at 12–13 (footnote omitted). Furthermore, "given that SVK was not privatized by means of an asset sale, such an inquiry, under the Court's approach, does not appear to be relevant." *Id.* at 13 (footnote omitted).

Commerce also attempts to explain its statement in the *Privatization Remand* that "because DHS owned SAG, the former SVK/DHS's assets and liabilities remained with DHS, albeit indirectly, even after the transfer of the assets and liabilities of the former SVK/DHS to the newly-created SAG." *Privatization Remand* at 21 n.37. Commerce explains that DHS, as the holding company, owned SAG and Dillinger as subsidiaries. "Thus," according to Commerce, "all the assets and liabilities of SAG remained, albeit indirectly *(i.e.,* by means of a holding company/wholly-owned subsidiary corporate relationship), with DHS, SAG's 'parent' corporation." *Redetermination* at 13–14.[8]

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[7] On the transfer of assets and liabilities, Commerce adds:

> DHS/Dillinger does not cease to be for all intents and purposes the same entity which received the subsidies simply because most of SVK/DHS's assets and liabilities were transferred to the newly-created operating subsidiary SAG two weeks after the privatization. The privatized DHS/Dillinger continued to benefit from those assets and to be responsible for the remaining liabilities after the transfer to SAG, just as it had after the combination with Dillinger but prior to the creation of SAG.

Redetermination at 11 n.13. Commerce also reprints the portion of its *Privatization Remand* in which Commerce noted:

> The Court did not provide specific instructions as to how the Department should determine whether the privatized entity is the same "for all intents and purposes" as the pre-privatized entity. Because a corporation is nothing more than an artificial legal person with a collection of assets and liabilities, when the corporate form changes but the assets and liabilities remain in the new legal entity, we find it reasonable to conclude, for purposes of this remand determination, that the post-privatization entity is the same for all intents and purposes as the pre-privatization entity. While other interpretations of the Court's order with respect to this issue are also possible, we believe our interpretation most closely adheres to the letter and spirit of the Court's decision.

Privatization Remand at 31, *reprinted in Redetermination* at 11 n.14. Commerce claims its "reasoning was implicitly endorsed by the Court when it upheld the Department with respect to the privatization in the United Kingdom." *Redetermination* at 11 n.14 (citing *British Steel II,* 924 F. Supp. at 190).

[8] Commerce quotes *Black's Law Dictionary* for the proposition that "[h]olding companies exist for the purpose of 'owning stock in, and supervising management of, other companies.'" *Redetermination* at 13 n.20 (quoting *Black's Law Dictionary* 658 (5th ed. 1979)).

On the issue of whether Commerce may countervail DHS or any other party, Commerce reasons it may properly countervail the production of DHS because: (1) the subsidies at issue were "provided to" SVK; (2) SVK is for all intents and purposes the same as pre-combination, pre-privatization DHS; and (3) pre-combination, pre-privatization DHS is for all intents and purposes the same as post-combination, post-privatization DHS. "Therefore," Commerce reasons, "the Department properly calculated countervailing duties against Dillinger's production equal to the allocated portion of the subsidies attributable to Dillinger." *Id.* at 14. Commerce further explains:

> As nothing more than a holding company, DHS neither produces nor exports merchandise of any kind * * *. DHS's two subsidiaries, Dillinger and SAG, did produce and export merchandise during the period of investigation. Therefore, the subsidies received by DHS are attributable to the production of Dillinger and SAG as subsidiaries of DHS. Accordingly, the production of both Dillinger and SAG are receiving the current benefit of previously-bestowed subsidies. Of the two, only Dillinger produced subject merchandise.

Id.

On the issue of why Dillinger and/or SAG are liable for subsidies, Commerce explains that in accordance with its practice of treating domestic subsidies as "untied,"[9] Commerce "has long attributed domestic subsidies received by holding companies (other than multinational holding companies) over the total sales of all subsidiaries owned or otherwise controlled by the holding company, absent evidence that the subsidies were 'tied' to a particular product or market." *Id.* at 16 (footnote omitted). Although Dillinger has argued that the subsidies at issue were tied to SVK's production, Commerce explains, the benefits of debt forgiveness were not tied to any specific product or market.[10] Thus, Commerce reasons, it properly allocated the benefits over all of DHS sales.

CONTENTIONS OF THE PARTIES

A. *Dillinger:*

Dillinger argues against Commerce's *Redetermination*. Dillinger first complains that despite Commerce's earlier finding that the transaction at issue involved a sale of assets, Commerce has now concluded on the same set of facts that the transaction "'was achieved by means of a combination with another corporation and the exchange of stock.'" (Initial Comments on May 22 Remand Results (Dillinger's Comments) at 1–2

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[9] Commerce defines "untied" as "meaning the denominator will include the firm's total sales." *Redetermination* at 16 (citation omitted).

[10] Commerce provides the following support for this statement: (1) nothing on the record indicates the debt forgiveness was tied; (2) the acknowledged intent of the debt forgiveness was to improve the overall financial condition of SVK for its combination with Dillinger; (3) the debt forgiveness was a pre-condition to the combination transaction; (4) Dillinger and SAG has profit and loss agreements with DHS requiring Dillinger and SAG to transfer profits to DHS and requiring DHS to assume any losses; and (5) Dillinger does not make profits for tax purposes, but rather its income is imputed to DHS.

(quoting *Redetermination* at 7–8).)[11] Dillinger argues Commerce's classification of the transaction as "'a combination with another corporation and the exchange of stock' is factually misleading and incomplete and confuses the mechanics of the transaction with its substance and intent." *(Id.* at 2.) According to Dillinger, no merger or consolidation occurred. Furthermore, Dillinger argues, Commerce

> also fails to follow its own rule that form rather than substance should govern the determination of subsidies by exploiting the form of this transaction at the expense of the substance to achieve a result that is not otherwise available. By focusing on the mechanics of capturing SVK's tax-loss carryforward, a valuable but nonetheless secondary component of the transaction, as the linchpin for finding DHS to be the company that benefitted from the subsidies bestowed upon SVK, [Commerce] gives primacy to form over substance. Had there been no tax-loss carryforward, the GOS would have still received its proportionate shares in the holding company created for its contribution in the amount of SVK's assets plus cash,[12] but the market-based value of those assets would have been less, and the GOS would therefore have had to have contributed more cash to obtain its desired proportionate share. The tax-loss carryforward has become a means of diverting attention from the fact that [Commerce] cannot produce a valid theory to support its finding that DHS is the subsidy recipient, so that it can, in turn, countervail Dillinger.

(Id. at 3 (additional footnote omitted).) Additionally, Dillinger asserts Commerce erroneously uses the terms "DHS/SVK" and "DHS/Dillinger" when in fact "there was no pre-privatization DHS. DHS was created in the transaction solely to hold the two steel-producing operating subsidiaries * * *." *(Id.* at 4.)

Second, Dillinger purports to clarify Commerce's recitation of the facts regarding the transaction. According to Dillinger, SVK became SAG and Dillinger remained a separate, independent operating subsidiary. Therefore, "it is incorrect to state in the description of the transaction that parties contributed to or received shares in a 'combined' entity when the only entity to which parties contributed was DHS." *(Id.)* Dillinger further asserts that the "debt forgiveness" was not a precondition of a combination of SVK and Dillinger because SVK and Dillinger remained independent operating subsidiaries after the transaction just as they were prior to the transaction.

Third, Dillinger agrees with Commerce that the subsidies at issue were provided to SVK, and that Dillinger received *de minimis* levels of actual subsidies. Dillinger disagrees, however, with Commerce's finding that post-privatization DHS is for all intents and purposes the entity

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[11] Dillinger explains it "fully agrees" with Commerce that the form of the transaction should not be determinative, "and has argued throughout these proceedings that there was no benefit from prior subsidies in this case because SVK was privatized at market value in an arm's-length transaction on terms consistent with commercial considerations." (Dillinger's Comments at 1 n.2 (citation omitted).)

[12] Dillinger adds, "As is clear in the record, since there was never any intent by the parties to merge productive operations, the holding company was always contemplated." (Dillinger's Comments at 3 n.6.)

that received the subsidies. According to Dillinger, "all but the shell of SVK" was spun off to SAG. In fact,

> none of the attributes of the post-privatization DHS give the agency any basis upon which to justify the conclusion that it is, in essence, SVK. At the same time, the agency refused to even consider whether [SAG] was for all intents and purposes the same entity that received the subsidies.

(Id. at 6.) Furthermore, Dillinger argues,

> virtually everything that Usinor Sacilor received of SVK in the transaction was spun down into a separate operating subsidiary, [SAG], as an integral part of the transaction. The creation of Saarstahl as Usinor Sacilor's long products production subsidiary in Germany was not simply another step in the transaction, it was the whole point of [sic] transaction.

(Id.)

Fourth, Dillinger agrees with Commerce that the parties did not discuss discounts in the purchase price. Dillinger comments, however, that any "notion of discounts is theoretical at best, and it is very unlikely that foreign companies would base their purchase price on something as speculative and unpredictable as a potential U.S. countervailing duty case sometime in the future, rather than on the market." *(Id.* at 6 n.10.)[13]

Fifth, Dillinger argues that even if DHS is deemed to be the subsidy recipient, Commerce has failed to explain why Dillinger should be charged with the benefit. "[I]t is questionable whether, even if the SVK benefits were deemed to be attributable to the parent company, they could then flow to an uninvolved, unsubsidized subsidiary, based on a second presumption, particularly in light of verified evidence to the contrary conclusively rebutting that presumption in this case." *(Id.* at 7 n.11.) Furthermore, in light of the record, "even if benefits were found to flow through from SVK after the privatization, no other entity except [SAG] could reasonably be considered 'for all intents and purposes' the entity that received the subsidies." *(Id.* at 7–8.)

Finally, Dillinger does not challenge Commerce's "practice that, normally, general subsidies bestowed directly on a parent company may be attributed to its subsidiaries. However, * * * there must first be a legitimate finding that the general subsidies were bestowed upon the parent company in the first instance." *(Id.* at 8.) In the present case, "the bestowal of such subsidies must have taken place while the companies were subsidiaries of the parent." *(Id.* (footnote omitted).) Dillinger further argues it is incorrect to say "that subsidies to SVK, which produced

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[13] Dillinger further explains:

> [I]t is worth noting that the notion of discounts has little meaning when the company under discussion has a negative net worth to begin with, as in this case. This notion would seem have [sic] validity only if it could be shown that the company's assets might retain the value represented by subsidies used to purchase them at the time of privatization. The fact that the company was in a negative net worth position was the primary reason the acquisition in this case focused on the *assets* of SVK as the GOS contribution to DHS. Whatever the company's overall net worth on its books, its assets had a specific market value that could be, and was, calculable.

(Dillinger's Comments at 6 n.10.).

only long products, were not tied to the production of any particular product; therefore, they retained the character of a 'general' subsidy, the benefits of which were allegedly enjoyed by Dillinger, a separate steel plate producing subsidiary, after the transaction." *(Id.)* Dillinger argues there were no benefits for it to enjoy in this case, and Commerce has not identified any.

B. *Commerce:*

Commerce first argues it reasonably determined DHS was for all intents and purposes the same entity that received the subsidy, SVK. In light of this finding, Commerce argues, it also correctly determined it could properly impose countervailing duties on the production of the two subsidiaries, Dillinger and SAG: "[S]ubsidies received by holding companies such as DHS (other than multinational holding companies) are attributable over the total sales of all subsidiaries owned or otherwise controlled by the holding company, absent evidence that the subsidies were 'tied' to a particular product or market." (Rebuttal of the U.S. to the Initial Comments of AG der Dillinger Huttenwerke (Commerce's Resp.) at 4 (citation and footnote omitted).)

Second, Commerce argues it complied with the remand order, and the *Redetermination* is reasonable and fully supported by the record. Commerce contends Dillinger has downplayed the complexity of the transaction. Commerce's analysis, the agency argues, "[f]ar from elevating form over substance, * * * goes to the heart of the German privatization and what was sought to be accomplished." *(Id.* at 5.) Commerce points to a number of its findings in the *Redetermination,* including Commerce's taking into account the spin-off of SAG. Commerce further argues its *Redetermination* fully comports with *British Steel I* and *British Steel II.* Dillinger has offered no alternative view, Commerce maintains, to the agency's reasoning tha

> "[t]he Court did not provide specific instructions as to how the Department should determine whether the privatized entity is the same 'for all intents and purposes' as the pre-privatized entity. Because a corporation is nothing more than an artificial legal person with a collection of assets and liabilities, when the corporate form changes but the assets and liabilities remain in the new legal entity, * * * the post-privatization entity is the same for all intents and purposes as the pre-privatization entity."

(Id. at 7–8 (quoting *Redetermination* at 11 n.14 (citation omitted)).) Additionally, Commerce asserts, this Court "has implicitly endorsed this interpretation by sustaining Commerce's determination with respect to the privatization in the United Kingdom." *(Id.* at 8 (citing *British Steel II).*)

Finally, Commerce contends that "[n]either Commerce nor this Court have ever required that for subsidies to be attributable to the production of a subsidiary, that subsidiary must have been under the control of the parent at the time the subsidies were bestowed." *(Id.)* Regardless, Com-

merce argues, such a rule does not preclude a finding Dillinger benefitted here:

> [T]he purpose of forgiving the debt was not just to benefit SVK; it was also a precondition for Usinor Sacilor to enter the privatization by exchanging its interest in Dillinger and thereby acquiring its majority interest in DHS. The next day, after SVK changed its name to DHS and Usinor Sacilor had, in fact, contributed its interest in Dillinger, the entire newly privatized company (including Dillinger) began enjoying the benefits of the forgiven debt. Thus, the benefit of the debt forgiveness was attributable to Dillinger's production from the outset of the privatization.

(Id. at 8–9 (citation omitted).) Furthermore, Commerce argues, the tax loss carryforward and the profit and loss agreements indicate Dillinger's financial condition cannot be isolated from DHS and SAG. Instead, "'the financial status and health of all three companies was closely intertwined.'" *(Id.* at 9 (quoting *Redetermination* at 18).) Commerce also points to its finding in the *Redetermination* that nothing on the record indicates the debt forgiveness was tied to the production of any specific product.

C. *Domestics:*

Domestics support the *Redetermination.* First, Domestics argue Commerce fully complied with this Court's remand instructions. Second, Domestics argue the *Redetermination* is supported by substantial evidence on the record and is otherwise in accordance with law.

Domestics point to a number of "critical uncontested facts of record relating to the transaction," and argue Commerce "reasonably concluded that as part of the privatization, everything (assets, rights, and liabilities) that was the subsidized SVK became SVK/DHS and then the privatized DHS/Dillinger." (Domestic Producers' Rebuttal to Initial Comments of AG der Dillinger Huttenwerke (Domestics' Comments) at 2–3.) Domestics dispute Dillinger's assertion Commerce failed to take into account the spin-off of remaining assets and liabilities to SAG: "The spin-off occurred *after* SVK was privatized * * *. Under the Court's analysis, the central inquiry is whether the subsidized pre-privatization entity 'continued to be, for all intents and purposes, the same enterprise *after the privatization* such that Commerce may continue to countervail that entity.'" *(Id.* at 4 (footnote omitted).) Thus, Domestics continue,

> the spin-off of SAG after the privatization of SVK is no different than any other post-subsidy reorganization of a subsidy recipient, which, in accordance with the agency's practice, and * * * has no effect on the allocability of subsidies to all of the recipient's production (including that of its divisions or subsidiaries), unless the subsidies are tied (which these are not).

(Id. at 4–5 (footnote omitted).) Additionally, Domestics maintain, Commerce has not placed form over substance: "As Dillinger has previously conceded, the '*only reason*' for structuring the transaction in this manner was to ensure that the tax loss carryforward would remain with

DHS to the benefit of DHS and both of its subsidiaries. Here form follows function." *(Id.* at 5 (footnote omitted).) Moreover, Domestics add, DHS, not SAG, was the intended beneficiary of the transaction in the first instance. And, even if the spin-off was relevant, Commerce correctly found those assets, rights, and liabilities remained indirectly with DHS as SAG's parent company.

Domestics also argue the debt forgiveness subsidy provided to SVK was, legally and factually, untied:

> [T]here is no indication on the record that the debt forgiveness subsidy was intended to benefit the production of any specific product or products * * *. Rather, the record demonstrates that the debt was forgiven to improve the financial condition of SVK so that it could be sold without impairing the new entity.

(Id. at 8 (footnote omitted).) As to Dillinger's argument that Commerce has failed to identify any benefit to Dillinger, Domestics answer that Commerce is not required to identify effects once a subsidy is bestowed. Regardless, Domestics argue, "as Dillinger's financial results are intertwined with those of DHS/Dillinger in accordance with, for example, the profit and loss agreement, Dillinger certainly benefitted from the debt forgiveness." *(Id.* at 9.)

DISCUSSION

In the beginning of the *Redetermination,* Commerce states:

> While complying with the instructions of the Court, the Department strongly disagrees with the fundamental premise of the Court's earlier decisions that the form of the privatization transaction *(i.e.,* asset sale versus stock sale) is the principal factor to be examined when determining the Department's authority to impose countervailing duties on a post-privatization entity. A privatization transaction can be structured as an asset sale or stock sale. The particular form a privatization takes *(i.e.,* asset sale versus stock sale) should not be determinative of whether or not, or, the extent to which, the privatized entity may be continuing to benefit from prior subsidies.

Redetermination at 1. Commerce's statement is a misreading of this Court's opinions. In *British Steel II,* this Court directly addressed the same misinterpretation, which Commerce had included in the first remand determination. This Court stated as follows:

> The Court's remand instructions in *British Steel [I]* explicitly required consideration of substance. This Court ordered Commerce to determine "the terms and *substance* of each transaction," and "whether, * * * if a privatization or partial privatization took place, *the privatized entity continues to be, for all intents and purposes, the same entity* that received subsidies prior to the privatization or partial privatization transaction."
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> * * * * * * *
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> The error lies in Commerce's conclusion that it is to examine "in some circumstances" substance as well as form. Although form may

> be an indicator of whether an entity survives a privatization transaction, substance, not form, is the key. It is Commerce's duty, and not the duty of this Court, however, to determine when form is not a true indicator of substance, and how then to determine whether the entity that received subsidies survives the privatization transaction.

British Steel II, 924 F. Supp. at 157–58 n.25 (citation omitted). This Court also stated that

> form is subordinate to substance. As this Court explained in *British Steel [I]*,
>
> > [i]t is conceivable that foreign governments, transferors, and transferees could try to structure their privatization transactions to evade potential tariff liability under United States' CVD laws* * *. Commerce, using its considerable expertise and insisting that such transactions be based upon good faith commercial considerations, should be able to ferret out sham transactions.

Id. at 157 (quoting *British Steel I*, 879 F. Supp. at 1277 and *id.* at 1277 n.35 ("Presumably, if the only reason governments are structuring privatization transactions is to evade countervailing duties, and do so without commercial considerations, Commerce will look upon such transactions with disfavor.")) (footnote omitted).

The Court is deeply concerned with Commerce's repetition of a misinterpretation, which this Court took pains to correct in its last decision on this issue, because it has the potential to effect this proceeding.[14] Furthermore, Commerce's misinterpretation in the *Redetermination* are belied not only by its own comments on the *Redetermination*,[15] but also by the remainder of the *Redetermination* itself which gives primacy to substance over form.

In the *Redetermination*, Commerce has concluded that SVK, the enterprise to whom subsidies were provided, is for all intents and purposes DHS. Commerce has reached this conclusion despite: (1) the transfer of all assets of DHS, except for the tax loss carryforward, and all liabilities of DHS, formerly SVK, to SAG; and (2) what Commerce

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[14] The Court stresses its alarm at Commerce's actions. Either Commerce simply does not understand this Court's opinions, or it is purposefully attempting to misstate them in order to affect the outcome of these proceedings. If in the future this Court discerns any willful disregard of its opinions and orders, it may find it appropriate to invoke U.S. CIT R.11.

[15] For example, Commerce responds to Dillinger's criticism that the *Redetermination* "gives primacy to form over substance," as follows: "Far from elevating form over substance, Commerce's analysis goes to the heart of the German privatization and what was sought to be accomplished." (Commerce's Resp. at 5.) Additionally, Commerce restates in the *Redetermination* its interpretation of this Court's initial remand instructions, equally applicable to the *Redetermination:*

> "The Court did not provide specific instructions as to how the Department should determine whether the privatized entity is the same 'for all intents and purposes' as the pre-privatized entity. Because a corporation is nothing more than an artificial legal person with a collection of assets and liabilities, *when the corporate form changes but the assets and liabilities remain in the new legal entity, we find it reasonable to conclude, for purposes of this remand determination, that the post-privatization entity is the same for all intents and purposes as the pre-privatization entity.* While other interpretations of the Court's order with respect to this issue are also possible, we believe our interpretation most closely adheres to the letter and spirit of the Court's decision."

Redetermination at 11 n.14 (emphasis added) (quoting *Privatization Remand* at 31).

The Court also notes Domestics' comments on the *Redetermination* echoing those of Commerce. *(See* Domestics' Comments at 5 ("Nor has the Department placed form over substance. As Dillinger has previously conceded, the '*only reason*' for structuring the transaction in this manner was to ensure that the tax loss carryforward would remain with DHS to the benefit of DHS and both of its subsidiaries. Here form follows function.") (footnote omitted).)

describes as the "combination" of DHS and Dillinger. These two factors did not alter Commerce's conclusion that SVK is, for all intents and purposes, DHS apparently because: (1) although the identity of the shareholders and the relative shareholdings differed, there was no change in corporate identity; (2) the contribution of assets to a corporation in exchange for stock does not alter the corporate identity; (3) all of the pre-"combination" assets and liabilities remained, directly or indirectly, with post-transaction DHS; (4) DHS continued to benefit from the assets transferred to SAG and to be responsible for the remaining liabilities; (5) the transaction was designed to allow the tax loss carryforward to benefit DHS after the "combination"; and (6) under German income tax law, DHS is SVK's successor company, and under that law, "a condition of eligibility for a tax loss carryforward is the 'corporation's legal and financial identity with the corporation that incurred the losses.'"

Based on these factors, this Court finds Commerce's determination that SVK is for all intents and purposes DHS is supported by substantial evidence and otherwise in accordance with law. Arguably, one could conclude that because the form of the transaction was a "combination" with another company and the subsequent transfer of all liabilities and assets except for tax loss carryforward to SAG, DHS is not the same enterprise for all intents and purposes as SVK. Form, however, is not controlling. Instead, "form is subordinate to substance." *British Steel II,* 924 F. Supp. at 157. Commerce's explanation has identified substantial evidence to support its conclusion that, substantively, DHS is SVK for countervailing duty purposes. *See Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") (citations omitted); *Matsushita Elec. Indus. Co. v. United States,* 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984) ("It is not the function of a court to decide that, were it the [agency], it would have made the same decision on the basis of the evidence.").

The second aspect of the *Redetermination* that this Court must examine is Commerce's attribution of the subsidies received by DHS to the production of Dillinger as a subsidiary of DHS. Commerce's attribution apparently rests on: (1) its practice of treating domestic subsidies as untied; (2) its practice of attributing domestic subsidies received by non-multinational holding companies over the total sales of all subsidiaries owned or otherwise controlled by the holding company, absent evidence of tying to a particular product or market; and (3) its finding here that the benefits of the debt forgiveness were not tied to a particular product or market. Dillinger informs this Court that as Commerce "correctly notes, the parties have not challenged [Commerce's] practice that, normally, general subsidies bestowed directly on a parent company may be attributed to its subsidiaries." (Dillinger's Comments at 8.) What Dillinger does argue is that "[u]nder facts like those present in this case, the bestowal of such subsidies must have taken place while the compa-

nies were subsidiaries of the parent." (*Id.* (footnote omitted).) According to Dillinger, the subsidies were provided to SVK, a producer of long products only, and no benefits from those subsidies flowed to Dillinger.

Commerce's attribution of the subsidies received by DHS to the production of Dillinger as a subsidiary of DHS is supported by substantial evidence and is otherwise in accordance with law. The fact that SVK produced only long products does not mean in this instance that the debt forgiveness was tied to long product production. Commerce has found the debt forgiveness to constitute a precondition of the transaction at issue. This finding is supported by the facts of the transaction—a transaction in which Usinor Sacilor contributed its shares in Dillinger in exchange for a majority interest in DHS. Thus, the fact that SVK produced long products at the time of debt forgiveness is not fatal to Commerce's attribution. Accordingly, this Court sustains Commerce's attribution of the subsidies. *See Consolo,* 383 U.S. at 620.

II. *German Country-Specific Issues Relating to Privatization:*

As discussed, Domestics have submitted a motion for judgment on the agency record in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD. In that motion, Domestics argue four issues, one of which is related to privatization. That argument, however, pertains to Commerce's findings in the *German Final Determination* because Domestics submitted their motion prior to any remand of the *German Final Determination* by this Court. Domestics argue Commerce incorrectly found in the *German Final Determination* that: (1) the loan forgiveness benefitted SVK and was passed through to DHS; (2) the creation of DHS was a privatization; and (3) the privatization resulted in a partial repayment of the loan forgiveness subsidy. Essentially, Domestics claim is that the subsidy was provided directly to DHS, and thus whether or not SVK was privatized is irrelevant. Commerce's findings in the *German Final Determination,* Domestics argue, contradict Commerce's findings in a related determination.

Subsequent to Domestics' filing of the motion for judgment on the agency record in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD, this Court has twice remanded the *German Final Determination* on the privatization issue. This Court interprets Domestics' most recent filing, the comments on the *Redetermination,* to embody Domestics' position on the privatization transaction at issue. As discussed, Domestics support Commerce's *Redetermination.* Thus, this Court regards Domestics' arguments pertaining to privatization in the country-specific motion for judgment on the agency record to be subsumed by Domestics' comments on the *Redetermination.* Accordingly, this Court will enter final judgment pursuant to Rule 54(b) as to counts I, II, and III in the complaint of the Domestic Producers in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD.

Dillinger also submitted a country-specific motion for judgment on the agency record in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD. In that motion, Dillinger sets forth six

arguments, all of which this Court will address in order to enter final judgment as to Dillinger's complaint. The first argument concerns issue preclusion. Dillinger maintains that Commerce's original privatization methodology was found invalid by this Court in *Saarstahl* based on facts identical to those at issue, and thus *Saarstahl* is dispositive of the current case. The Court rejects Dillinger's argument. First, this Court has already denied Dillinger's motion for summary judgment based on issue preclusion in *British Steel I*. Second, the Court denies Dillinger's argument given the state of the current proceeding and of *Saarstahl*.

Dillinger's second contention is that Commerce improperly allocated the subsidies at issue over total DHS sales, including Dillinger's sales of flat-rolled steel plate products. The Court rejects this argument as well. As this Court has found above and for the reasons stated above, Commerce's allocation of the subsidies at issue is supported by substantial evidence and is otherwise in accordance with law.

Third, Dillinger argues Commerce's finding that abandonment of contingent repayment obligations (RZVs) constituted forgiveness of long-term, contingent-liability, interest-free loans is not supported by the record.[16] Dillinger maintains that, assuming any benefits survived privatization, Commerce should have treated the RZVs as grants when provided. No payments ever came due on the RZVs, Dillinger argues, because the firm never returned to profitability: "Its repayment obligations remained contingent and, since the contingency never occurred, the repayment obligation never became fixed and owing." (Dillinger's Mot. for J. on Agency R. (Dillinger's Br.) at 37.)[17] If the RZVs were not grants, Dillinger continues, Commerce should consider the RZVs to be hybrid instruments under Commerce's equityworthiness methodology and classify them as equity at the time they arose. In addition, Dillinger argues, "[i]t is particularly troublesome that [Commerce] adheres to its finding that the RZVs were debt instruments, and that the abandonment of the RZVs constituted debt forgiveness in 1989 because, as a purely factual matter, the 'debt' found in this case has not been 'forgiven.'" *(Id.* at 40.) The Governments of Germany and Saarland, Dillinger argue, abandoned the RZVs because they were worthless. However, the governments could lay claim to the assets of SAG in a bankruptcy proceeding.

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[16] Although Dillinger's arguments predate the *Redetermination*, Commerce's findings regarding the subsidy at issue, the forgiveness of debt, are reflected in the *Redetermination:*

> In the years prior to 1989, [SVK] and its predecessor companies received massive amounts of assistance from the Governments of Germany and Saarland. Repayment of this assistance was contingent upon SVK returning to profitability * * *.
>
> * * * * * * * *
>
> On June 14, 1989, the Government of Germany * * * and the GOS forgave all of the outstanding debts owed to them by SVK. This debt forgiveness was a pre-condition to the combination of SVK and Dillinger. Private creditors also forgave a portion of the debt owed to them by SVK.

Redetermination at 5–6 (footnote omitted). Thus, Dillinger's arguments concerning whether the abandonment of the RZVs constituted a countervailable subsidy appear currently viable.

[17] Moreover, Dillinger adds, knowing they had "no realistic chance of ever being paid back" due to the firm's financial state, the Governments of Germany and Saarland continued to provide funds to the company, "and the RZVs which arose in conjunction with the disbursement of funds became little more that [sic] a legal technicality under German administrative law." (Dillinger's Br. at 38.)

In response, Commerce explains it

> determined that Saarstahl SVK's repayment obligations were debt instruments and that the governments' forgiveness of that debt in 1989 was a countervailable event. Commerce treated the debt forgiveness as a grant received in that year, in an amount equal to the face value of the RZVs.

(Def.'s Mem. in Resp. to Pls.' Mots. (Def.'s Resp.) at 29.) Commerce argues its classification of the RZVs or contingent repayment obligations as debt is supported by substantial evidence first because "[t]he hallmark of debt is the obligation to repay." *(Id.* at 30 (citation omitted).) Because the RZVs required repayment, Commerce argues it properly treated them as debt. Second, Commerce maintains Dillinger ignores the fundamental nature of a grant, which is, in part, the provision of funds "'without expectation of a * * * payment of any kind.'" *(Id.* at 31 (citation omitted) (Commerce's emphasis deleted).) The fact that the contingency did not occur antecedent to cancellation of the RZVs, Commerce reasons, "does not change the essential character of the instruments, which were obligations to repay." *(Id.* at 32 (citation omitted).) According to Commerce, Dillinger confuses the repayment obligation with terms and conditions for repayment. Furthermore, Commerce argues, no evidence in the record suggests the governments provided the RZVs with the knowledge the firm could not meet the repayment obligations, and, "[g]iven that they did attach a repayment obligation, it was reasonable for Commerce to find that the RZVs constituted debts of the company." *(Id.* at 33.) As to Dillinger's argument that the RZVs should be classified as equity, Commerce claims: (1) Dillinger did not raise the issue below; and (2) Dillinger has erroneously read Commerce's criteria used to identify hybrid instruments as debt or equity. Finally, regarding Dillinger's argument concerning bankruptcy, Commerce responds: (1) the events giving rise to the bankruptcy occurred subsequent to the period of investigation and, therefore, are not supported by the record; and (2) the bankruptcy does not impact benefits accruing during the period of investigation.

This Court rejects Dillinger's arguments on this point. There is no dispute that the RZVs bore an obligation to repay, although the contingency triggering repayment never occurred. Commerce, in its expertise, has interpreted this evidence to conclude the repayment obligations were debt instruments and that the governments' forgiveness of that debt in 1989 was a countervailable event. Although Dillinger would prefer a different outcome, this Court cannot say Commerce's determination is not supported by substantial evidence. *See Consolo,* 383 U.S. at 620 ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") (citations omitted).

Fourth, Dillinger argues that assuming the 1989 abandonment of the RZVs was a countervailable event, Commerce erred in determining that the value of the abandoned RZVs in 1989 was their "face" value. Under

Commerce's proposed regulations, Dillinger explains, "forgiveness of debt" is measured as an amount equal to the outstanding principal and accrued unpaid interest at the time of forgiveness. Here, however, the RZVs had no outstanding principal or interest at abandonment. Furthermore, even if the RZVs are considered a "forgiven loan," under Commerce's allocation rules the "forgiven" amount is still zero in 1989. Valuation of the RZVs as zero is also supported by German accepted accounting principles, Dillinger argues. Outside independent auditors evaluating the proper value to be placed on the abandonment of the contingency found the value to be zero. Dillinger maintains only an abandonment of a contingent repayment obligation occurred, not a forgiveness of actual liability. Furthermore, as Commerce has determined, Dillinger argues it received no benefit from its affiliation with SAG.

Commerce responds that face value represents the "principal" amount of a loan, and that "[a] contingent repayment obligation does not alter the total outstanding liability, * * * it is the elimination of that liability which gives rise to the countervailable benefit." (Def.'s Resp. at 41.) Thus, Commerce explains, "it is Commerce's practice to measure the benefit from debt forgiveness based on the face value of the debt, even when there is a contingent obligation to repay." *(Id.* (citations and footnote omitted).) In this case, Commerce reasons, the unencumbering of future profits was a benefit equal to the amount of the liability that was extinguished.

This Court rejects Dillinger's argument on this point. Commerce's treatment of the debt forgiveness as a grant received in that year in an amount equal to the face value of the RZVs is based on a sustainable interpretation of its proposed regulation. *Cf. Asociacion Colombiana de Exportadores de Flores v. United States,* 8 Fed. Cir. (T) 126, 131, 903 F.2d 1555, 1559 (1990) ("The [agency's] interpretation of its own regulations implementing the statutes it administers is entitled to substantial weight.") (citation and internal quotations omitted).

Fifth, Dillinger argues Commerce failed to apply properly its privatization methodology in the *German Final Determination,* in that Commerce incorrectly calculated the amount of subsidies "repaid" pursuant to its repayment methodology. Given this Court's decisions on the privatization issue and the present opinion, this argument is moot.

Finally, Dillinger argues Commerce erred in finding forgiveness of principal and interest by private banks constituted a countervailable subsidy. Commerce's practice, Dillinger argues, "is to find subsidies by private entities to be countervailable only when they are required by or at the direction of the government." (Dillinger's Br. at 50 (citations omitted).) Here, Dillinger contends, no evidence exists on the record to support a conclusion that the banks' action was required or directed by the Governments of Germany and Saarland: "While it was a requirement that the banks cooperate in order for the Governments' plan to succeed, there was nothing that compelled that cooperation, or would

have compelled that cooperation had the banks decided that another course of action was in their commercial best interests." *(Id.* at 52.) Dillinger claims, furthermore, that it is Commerce's practice to presume commercial institutions behave in a commercial manner, absent contrary evidence. Additionally, Dillinger argues the Governments' guaranteeing of the future liquidity does not alter their argument: "[W]ith respect to the *forgiven* debt, the assurance * * * was simply another commercial consideration that the banks would take into account in deciding whether or not participation in the plan * * * was in their best interests." *(Id.* at 54.) "[A]ny possible benefit to the company as a result of guarantees of future liquidity would apply only to the remaining, and not the forgiven, bank debt." *(Id.* at 56.) Dillinger also contends Commerce has engaged in impermissible burden shifting to the extent Commerce gave as a reason supporting its finding "'the absence of any documentation to support respondent's claim that the banks' actions were commercially sound.'" *(Id.* at 54 (quoting *German Final Determination,* 58 Fed. Reg. at 6236).)

Commerce responds that "based on the evidence of the governments' significant role in the private banks' debt forgiveness, Commerce determined that the debt forgiveness was a benefit provided, indirectly, by the governments and, therefore, countervailable." (Def.'s Resp. at 43 (citation omitted).) In so doing, Commerce argues two points. First, Commerce contends its long-standing practice is to find a benefit "provided or required" by government action under 19 U.S.C. § 1677(5) (1988) when a government "plays a significant role in bringing about the benefit." *(Id.* at 43–44 (footnote omitted).) That which constitutes a significant government role, Commerce argues, is not limited to explicit government direction. Commerce further argues Dillinger's interpretation of the statute would give meaning only to the word "required," thus violating the rule of statutory construction that significance and effect be accorded every word in a statute if possible. Second, Commerce contends the record supports its determination. Commerce explains its "determination was based upon the fact that the governments designed a plan in which the banks' debt forgiveness was necessary in order for the plan to succeed, and the governments provided the necessary incentive *(e.g.,* the liquidity guarantee) to secure the banks' cooperation." *(Id.* at 46 (footnote omitted).) Regarding the guarantee of future liquidity, Commerce explains the banks were willing to forgive a portion of the debt only if the governments guaranteed the future liquidity of the company: "The governments' liquidity guarantee was more than a 'consideration'; it was a necessary *condition* for the banks' debt forgiveness." *(Id.* at 47 (citation omitted).)

This Court rejects Dillinger's arguments. Commerce's determination is based upon a permissible construction of the statute. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is

based on a permissible construction of the statute.") (footnote omitted); *see also British Steel I,* 879 F. Supp. at 1263 ("The Court must accord substantial weight to the agency's interpretation of the statute it administers.") *(citing American Lamb Co. v. United States,* 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986) (further citations omitted)). Additionally, although Dillinger would interpret the evidence differently, Commerce has advanced substantial evidence to support its conclusion. *See Consolo,* 383 U.S. at 620.

Based on the Court's discussion above, the Court enters final judgment as to Dillinger's complaint filed under *AG der Dillinger Hüttenwerke v. United States,* Court No. 93–09–00596–CVD, one of the actions consolidated in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD.

CONCLUSION

After considering Commerce's *Redetermination* and the arguments of all parties thereon, and the arguments of all parties regarding the country-specific privatization issues discussed herein, this Court holds: (1) Commerce's *Redetermination* is supported by substantial evidence and is otherwise in accordance with law; (2) Domestics' arguments on the issue of privatization in their country-specific motion for judgment on the agency record filed in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD, are subsumed by Domestics' comments on the *Redetermination;* (3) regarding Dillinger's arguments in its country-specific motion for judgment on the agency record filed in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD, (a) the Court finds Dillinger's argument concerning the application of the privatization methodology in the *German Final Determination* is moot, and (b) the Court rejects the remainder of Dillinger's arguments; (4) the Court will enter final judgment pursuant to Rule 54(b) in *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD, consisting of *LTV Steel Co., Inc.,* et al. *v. United States,* Court No. 93–09–00568–CVD, *Thyssen Stahl AG,* et al. *v. United States,* Court No. 93–09–00585–CVD, *AG der Dillinger Hüttenwerke v. United States,* Court No. 93–09–00596–CVD, and *Fried. Krupp AG Hoesch-Krupp and Krupp Hoesch Stahl AG v. United States,* Court No. 93–09–00603–CVD, as to (a) counts I, II, and III in the complaint of the Domestic Producers who filed a complaint in *LTV Steel Co., Inc. v. United States,* Court No. 93–09–00568–CVD, and (b) the complaint of Dillinger filed under *AG der Dillinger Hüttenwerke v. United States,* Court No. 93–09–00596–CVD.

(Slip Op. 96–131)

A.N. DERINGER, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–02–00080

[Judgment entered for defendant.]

(Dated August 13, 1996)

Barnes, Richardson & Colburn (James S. O'Kelly and *Robert H. Schor),* for plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, U.S. Department of Justice, Commercial Litigation Branch, Civil Division *(Bruce N. Stratvert);* Office of Assistant Chief Counsel, U.S. Customs Service *(Edward N. Maurer),* of counsel, for defendant.

OPINION

GOLDBERG, *Judge:* This matter comes before the court following trial *de novo.* Plaintiff, A.N. Deringer, Inc. ("Deringer"), a customs broker acting as the importer of record, challenges the decision of the U.S. Customs Service ("Customs") denying Deringer's protest against Customs' liquidation of the subject merchandise. All conditions precedent to this action have been satisfied, and the court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

One entry of the merchandise at issue, No. 551–0591232–7, was imported through the port of Champlain on January 27, 1988. The merchandise was entered under Item 145.26 of the Tariff Schedules of the United States ("TSUS"), which provided for "Other edible nuts, shelled or not shelled, blanched, or otherwise prepared or preserved: Not shelled: Pistache," at the duty rate of 45¢ per pound and at a value of $17,734.00. *Joint Statement of Uncontested Facts,* ¶¶ 1–4. Deringer alleges that it did not receive any notices of extension or suspension of liquidation from Customs after the date of entry. Consequently, Deringer argues that pursuant to 19 U.S.C. § 1504 and 19 C.F.R. § 159.11–12, the subject merchandise was deemed liquidated by operation of law on the anniversary of the date of entry, January 27, 1989, at the rate of duty, value, quantity, and amount of duty asserted by the importer at the time of entry. *Plaintiff's Pretrial Brief* at 2. Deringer asks the court to hold Customs' subsequent liquidation of the entry on February 22, 1991, assessing additional duties, invalid.

The government argues that Customs provided the requisite notices within the meaning of the statute and regulations. Accordingly, the government argues that Customs' liquidation of the subject entry on February 22, 1991 was lawful and should be sustained by the court. *Defendant's Pretrial Memorandum* at 5–14.

In this case, the court must analyze what the law requires Customs to do in order to extend the period for liquidation of entries. The court must also decide whether Customs complied with the law such that its liquidation of February 22, 1991 may be held valid. Because the court finds that Customs properly extended the period for liquidation of the

subject entry in accordance with the statute and regulations, the court holds that Customs' February 22, 1991 liquidation of this entry is valid.

I. FINDINGS OF FACT

A. *Deringer's Case:*

At trial, Deringer's chief witness was Cindy Fresn, a Deringer employee since 1984. Ms. Fresn testified that in her capacity as a post-entry clerk she is responsible for processing, *inter alia,* notices of extension or suspension of liquidation. Ms. Fresn testified that upon the delivery of mail to Deringer, it is Deringer's practice to have a mail clerk segregate all notices of extension or suspension of liquidation and hand them to Ms. Fresn unopened. Ms. Fresn testified that she was the only Deringer employee responsible for processing extension or suspension notices in 1988 and 1989. In particular, Ms. Fresn testified that Deringer's mail clerk during that period, Ms. Joyce Boyce, did not process such notices.

Customs provides notices of extension or suspension of liquidation on Form 4333–A.[1] According to Ms. Fresn, upon receiving the mail from the postal carrier, Deringer's mail clerk is able to segregate all such notices based upon the distinctive envelope utilized by Customs to mail Form 4333–A. After Ms. Fresn receives these segregated notices from the mail clerk, she processes them in the following manner: she opens notice; she accesses Deringer's computer to ascertain which company is involved, as the form is completed in Deringer's name; and she completes an "out-card" which includes, *inter alia,* the date that the entry was pulled and whether there was an extension or suspension of liquidation. This out-card will be placed in Deringer's files to indicate that a particular entry file has been removed. Ms. Fresn then pulls the entry file which matches the extension or suspension notice and forwards the file and notice to Deringer's "classifier" for the subject merchandise who will assess the basis for the extension or suspension of liquidation. This classifier likely would have been involved with the original preparation of the entry.

Following such review, if the classifier is satisfied with the propriety of Customs' action, the entry file and attached notice are returned to Ms. Fresn who then forwards the original Form 4333–A to the shipper in Canada and retains a photocopy of the notice with the entry file for Deringer's records. If, however, the classifier finds fault with Customs' action, the classifier will temporarily retain the entry file and attached notice, while investigating the basis for the extension or suspension with Customs. Once such investigation is complete, the classifier will return the entry file and attached notice to Ms. Fresn who will process the notice in the manner noted above. Thus, in virtually all cases, the original notice of extension or suspension of liquidation is returned to

[1] The court notes that during the period at issue in this case, i.e. 1988 and 1989, Form 4333–A contained an insert which provided the actual notice of extension or suspension of liquidation. Customs no longer utilizes this insert. Instead, the information is printed on the back of the envelope; the information is now viewed by removing a perforated tab on the side of the envelope and peeling the front portion of the envelope away from the back portion.

Ms. Fresn who then forwards this original to the shipper in Canada.[2] Ms. Fresn includes an invoice for services rendered in forwarding the original Form 4333–A to the client, a copy of which is also placed in Deringer's entry file. The foregoing procedures are not memorialized in writing by Deringer, but instead were passed on to Ms. Fresn by her predecessor and have not since changed. Ms. Fresn spends approximately three to four hours each day processing notices of extension or suspension of liquidation in this manner.

With regard to the entry at issue in this case, Ms. Fresn testified that had Deringer received a notice of extension or suspension of liquidation, it would have been processed in accordance with the described procedure. To the best of her knowledge, Ms. Fresn does not recall seeing a notice of extension or suspension of liquidation concerning the subject entry. Further, Ms. Fresn reviewed her file concerning the subject entry prior to testifying in court and failed to find any record of a notice of extension or suspension of liquidation concerning this entry. Indeed, the file did not contain any correspondence from Ms. Fresn to the shipper concerning notices of extension or suspension of liquidation. Based upon the foregoing, Ms. Fresn assumes that Deringer never received a notice of extension or suspension of liquidation concerning the subject entry.

Ms. Fresn further testified that, on average, she processes approximately 500 to 1000 notices of extension or suspension of liquidation each week; this is the same number of notices she processed in 1988 and 1989. During her absences from work, such as when Ms. Fresn takes vacation or maternity leave, these notices are given to either the assistant manager or Deringer's branch manager in Champlain, who has a file clerk pull the entry files for delivery to the appropriate classifier. According to Ms. Fresn, despite the large number of files involved, she adheres to an unwritten policy by which the entry files and associated notices are always hand delivered to the appropriate classifier, and by which the classifiers always return the files to Ms. Fresn by hand delivery. Ms. Fresn testified that she never leaves files on an absent classifier's desk or in the classifier's in-box because of her concern that the files will be misplaced or lost. It is unclear how Deringer's classifiers return these files during those periods in which Ms. Fresn is absent from work.

Once Ms. Fresn is ready to generate an invoice for forwarding an original notice of extension or suspension of liquidation to the shipper in Canada, she enters the information into plaintiff's computer system. An invoice is not generated until the next morning. Thus, Ms. Fresn maintains a tray of up to 200 entry files on her desk awaiting generation of an invoice.

Ms. Fresn testified that Deringer does not maintain a log book of notices of extension or suspension of liquidation received from Customs,

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[2] With regard to certain of the countervailing duty cases involving merchandise from Canada, Ms. Fresn is not required to forward the original Form 4333–A to the Canadian shipper; in such cases, the original notices are instead placed in Deringer's files at the client's request.

or of any mail received from Customs. Further, Deringer does not maintain a log of outgoing mail which would indicate the receipt and processing of an extension or suspension notice for the subject entry.

As noted, Ms. Fresn testified that during the period that the defendant asserts that notices of extension and suspension of liquidation were sent to the plaintiff, Deringer employed Joyce Boyce as its mail clerk. As the primary recipient, Ms. Boyce would have been the first Deringer employee to handle any notices of extension or suspension of liquidation concerning the subject entry. Significantly, however, Ms. Boyce was not called to testify on behalf of the plaintiff. Indeed, Deringer did not even attempt to explain her absence at trial despite the fact that Ms. Boyce continues to be employed by Deringer, albeit in a different capacity. As a result, the court is unable to formulate a comprehensive assessment of the reliability of plaintiff's personnel and procedures for handling incoming mail during the period at issue in this case.

Deringer also called Gregory G. O'Mahony to testify at trial. Mr. O'Mahony was employed by Deringer's surety, Fidelity and Deposit of Maryland ("Fidelity"), as a claims attorney from 1981 to 1993. In that capacity, Mr. O'Mahony handled all claims coming into Fidelity's office in Quincy, Massachusetts. Mr. O'Mahony was solely in charge of the Deringer file. As a result, all correspondence involving Deringer, including notices of extension or suspension of liquidation from Customs, would be brought to his attention.[3]

Mr. O'Mahony testified that, upon receipt of extension or suspension notices from Customs, he would send Deringer a form letter inquiring as to its position and intentions regarding the notices. Mr. O'Mahony would include the original notices from Customs with this correspondence. According to Mr. O'Mahony, Deringer had an extremely good track record in responding to his inquiries. On average, Mr. O'Mahony forwarded approximately 50 such notices to Deringer each month.

Prior to testifying at trial, Mr. O'Mahony reviewed Fidelity's files concerning Deringer dating back to October 1988. He did not find any correspondence to or from Deringer concerning a notice of extension or suspension of liquidation for the entry at issue in this case. Based upon this, Mr. O'Mahony concludes that Fidelity never received such notices from Customs.

On cross-examination, Mr. O'Mahony testified that Customs' notices were mailed to Fidelity's post office box located in Baltimore. A Fidelity employee would pick up the mail each day from this post office box and bring it to Fidelity's Baltimore office. The Customs notices were then opened and all notices concerning Fidelity's Quincy office, including all notices involving Deringer, were sent to Mr. O'Mahony in a sealed envelope on a weekly basis. According to Mr. O'Mahony, the Fidelity employee that reviewed the Customs notices in Baltimore was able to

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[3] The court notes that it is not necessary for Customs to send an extension notice to a surety such as Fidelity. *Old Republic Ins. Co. v. United States*, 10 CIT 589, 596, 645 F. Supp. 943, 950 (1986).

distinguish those notices concerning Deringer based upon the code "551" that would appear on the notices.

Finally, Mr. O'Mahony noted that upon receipt of the sealed envelope by Fidelity's claims department in the Quincy office, the office supervisor would open the envelope and distribute the notices and attached memos from the Baltimore office to Mr. O'Mahony and his sole colleague in the department. Mr. O'Mahony would then have his secretary generate form letters for each of the notices that he received.

The court finds that the testimony proffered by plaintiff to establish Fidelity's nonreceipt of extension or suspension notices suffers from much the same defect as the testimony proffered to establish Deringer's nonreceipt of such notices. Mr. O'Mahony's testimony holds little persuasive value because neither Fidelity's clerk in the Baltimore office who segregated the mail and forwarded extension and suspension notices to Mr. O'Mahony, nor the office supervisor who distributed the notices to the claims attorneys in the Quincy office, were called to testify at trial. Furthermore, plaintiff made no attempt to explain their absence.

Charles Di Prinzio, Deringer's assistant branch manager in the Champlain office during 1988 and 1989, also testified at trial. Mr. Di Prinzio testified that he was directly responsible for the subject entry during this period. Mr. Di Prinzio reviewed Deringer's entry file prior to testifying, and did not locate any records of extension or suspension notices concerning the subject entry. Mr. Di Prinzio further testified that he has no recollection of receiving such notices from Customs in 1988 or 1989. Upon leaving the Champlain office in September 1989, Mr. Di Prinzio turned this file over to Mike Leahy. If during his tenure Mr. Di Prinzio had been unavailable to handle a matter that arose with regard to the subject entry, the matter would have been referred to the branch manager.

On cross-examination, Mr. Di Prinzio testified that at any one time the active files that he maintained in his office, such as the subject entry file, numbered less than fifty. Mr. Di Prinzio does not recall that Ms. Fresn ever brought him an extension notice concerning any of these files. According to Mr. Di Prinzio, the subject merchandise was originally entered as a consumption entry. In July or August of 1988, Deringer received a notice of proposed action from Customs for an additional assessment, including, *inter alia*, countervailing duties, based upon Customs' view that the true country of origin of the subject merchandise was not the country of origin stated on the original entry. At that time the subject entry file gained notoriety in Deringer's Champlain office because Deringer requested payment from the Canadian shipper of several hundred thousand dollars to cover this additional assessment. As the importer of record, Deringer ultimately paid liquidated damages equal to the cost to redeliver the merchandise.

In 1988, Mr. Di Prinzio assumed responsibility for some of Ms. Fresn's duties during her absence on maternity leave. Mr. Di Prinzio did not per-

sonally perform these duties, but had the work split between other people in his office. As the assistant manager, Mr. Di Prinzio had approximately 60 to 70 people working under him in the Champlain office. Notably, Mr. Di Prinzio stated that although he did on occasion return files to Ms. Fresn by hand delivery, he could not say that he never relied upon others in his office to return the files for him. Finally, Mr. Di Prinzio testified that the question of whether the period for liquidation of the subject entry had been extended never occurred to him, because he never received a final duty bill from Customs for this entry during the period that he worked in the Champlain office.

Mike Leahy, who succeeded Mr. Di Prinzio as assistant branch manager in Champlain in September 1989, held this position until June 1992. Mr. Leahy testified that he met with Mr. Di Prinzio in September 1989 and reviewed all active files, including the subject entry file. At that time, the issue of liquidated damages had not been resolved with Customs. This was apparently the most prominent aspect of the subject entry file at the time that Mr. Leahy succeeded Mr. Di Prinzio. Mr. Leahy testified that he does not recall seeing any record of a notice of extension of liquidation issued by Customs in 1988 at the time he reviewed the subject entry file in 1989. In addition, Mr. Leahy does not recall receiving or learning of a notice of suspension of liquidation for the subject entry in November or December of 1989. Prior to testifying in court, Mr. Leahy reviewed Deringer's entry file and did not find any evidence of notices of extension or suspension of liquidation for the subject entry. If such notices had been received by Deringer, Mr. Leahy would have expected to find copies of them in the file. Mr. Leahy further testified that the Canadian shipper never attempted to contribute to payment of the duties or penalties assessed in this matter.

On cross-examination, Mr. Leahy stated that because the issue of liquidated damages was still pending when he assumed responsibility for the subject entry file, any query concerning the liquidation status of the entry would have been pointless at that time. Although Mr. Leahy generally recalls conversations with Customs concerning the subject entry, he does not recall any specific conversations concerning extension or suspension of the period for liquidation.

Further, Mr. Leahy noted that Deringer switched sureties shortly after January 1988 from Fidelity to Washington International. While Mr. Leahy recalls receiving correspondences from Washington International as assistant branch manager in Champlain, he does not recall any correspondences from Fidelity concerning notices of extension or suspension of liquidation. Mr. Leahy does, however, recall form letters from Fidelity concerning liquidated damage claims. Notwithstanding Deringer's switch in sureties, Mr. Leahy stated that had Fidelity received a notice of extension or suspension of liquidation concerning one of its active files with Deringer, Fidelity would have forwarded a memo concerning the notice to Deringer. Mr. Leahy also stated that he should have been aware of any such correspondence, but if he had been absent from

work, such correspondence would have been given to the branch manager.

Significantly, Mr. Leahy testified that, on occasion, Ms. Boyce was brought in to process extension and suspension notices, either because of a backlog or because Ms. Fresn was absent from work. Mr. Leahy believes that, at times, Ms. Boyce and Ms. Fresn worked together to process such notices. During Ms. Fresn's absences, Ms. Boyce could have processed these notices alone. According to Mr. Leahy, the processing of extension and suspension notices was not an urgent matter, and although the office preferred that the notices be processed as they were received, backlogs did occur.

When Deringer received a notice of extension or suspension of liquidation concerning one of the active files that Mr. Leahy maintained in his office, the entry file would be returned to Mr. Leahy after Ms. Fresn forwarded the original notice plus invoice to the shipper in Canada. Mr. Leahy believes that these notices and associated entry files were, for the most part, hand carried within the office. Mr. Leahy acknowledges, however, that on occasion, he forwarded a notice and entry file to Ms. Fresn via office mail.

Mr. Leahy admitted that he would not have been surprised if Customs issued a notice of suspension of liquidation for the subject entry because of the countervailing duty issue involved. Mr. Leahy stated that the country of origin of the subject merchandise was still at issue in September 1989.

Upon consideration of the evidence, the court finds that the failure to present testimony from the primary recipients of the mail, both at Deringer and at Fidelity, undermines Deringer's claim of nonreceipt. A claim of nonreceipt in this context must be scrutinized carefully by the court, given the incentive that a plaintiff may have to claim that no notice was received. In order to establish nonreceipt, plaintiff should have introduced testimony from each available person who would have had contact with the incoming mail in the ordinary course of business. This would have allowed the court to formulate a comprehensive assessment of the reliability of both the personnel and procedures employed to process the mail once it was received. *Cf. Sanford Steel Pipe Products Co. v. United States*, C.D. 4359, 68 Cust. Ct. 192, 195 (1972) (finding that plaintiff failed to establish nonreceipt of notice of appraisement because plaintiff failed to introduce testimony of the primary recipient, i.e., plaintiff's mailroom employee, and plaintiff failed to explain this individual's non-appearance at trial).

The absence of the primary recipient of incoming mail in Deringer's Champlain office during the period under review, Ms. Boyce, is particularly disturbing. The evidence indicates that, on occasion, Ms. Boyce herself could have processed notices of extension or suspension of liquidation, without the assistance of Ms. Fresn. Deringer has failed to explain, however, why Ms. Boyce was not called to testify at trial despite

her apparent availability and despite the fact that her testimony is integral to plaintiff's case.

Even if the court were to disregard this gap in the testimony concerning Deringer's processing of incoming mail, based upon the court's assessment of the credibility of the testimony introduced by plaintiff, the court is not persuaded that Deringer's procedures for handling the large number of notices of extension and suspension of liquidation received each week are as foolproof as Ms. Fresn depicted in her testimony. The court observes that Ms. Fresn portrayed Deringer's internal procedures in unequivocal terms indicating that, once received, all extension and suspension notices are accounted for in Deringer's entry files. Ms. Fresn based this view in part on her testimony that Deringer's entry files and associated extension and suspension notices never leave human hands; they are hand delivered between personnel or not delivered at all. Yet, this testimony was directly contradicted by Mr. Leahy, who noted that, on occasion, Deringer's internal mail would be utilized to forward entry files and associated extension and suspension notices to the appropriate person within the company. Given Ms. Fresn's extensive personal familiarity with Deringer's handling of extension and suspension notices since 1984, her failure to acknowledge the occasional use of Deringer's internal mail distribution system seriously undermines the credibility of her testimony. Furthermore, Ms. Fresn testified that she was solely responsible for processing such notices when, according to Mr. Leahy, others within the company including Ms. Boyce would either assist or assume this responsibility. This also undermines the credibility of Ms. Fresn's testimony. In short, the court remains skeptical that Deringer's internal procedures, and the implementation of such procedures, perfectly account for all incoming mail so as to preclude the occasional misplacement of extension and suspension notices. The absence of corroborating records in plaintiff's entry file fails to provide a sufficient basis for concluding that Deringer never received a Form 4333–A in this case.

For all of the foregoing reasons, the court finds that Deringer has failed to establish nonreceipt of the Customs notices at issue.

B. *The Government's Case:*

For its part, the government begins by relying on two related presumptions. First, to establish mailing, the government relies upon the presumption of regularity that attaches to the acts of government officials. *See, e.g., International Cargo & Surety Ins. Co. v. United States,* 15 CIT 541, 544, 779 F. Supp. 174, 177 (1991) (finding that presumption of regularity gives rise to a presumption that notice in accordance with statutory and regulatory requirements has been given). Second, proof of mailing raises a presumption of delivery. *Intra-Mar Shipping Corp. v. United States,* C.D. 4160, 66 Cust. Ct. 3, 5–6 (1971). That presumption is

rebuttable by proof of nonreceipt. *Id.* The Federal Rules of Evidence address presumptions in civil actions in Rule 301, which states:

> [A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

As the Advisory Committee Notes to Rule 301 state, presumptions governed by this rule place upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to the presumption.

The government acknowledges that it does not have direct proof that the notices at issue were mailed to Deringer. To establish such mailing, the government first called John Ryan, an import specialist with Customs, to the stand. Mr. Ryan processed the subject entry from beginning to end in the port of Champlain. Mr. Ryan identified *Exhibit B* as Customs' lab report which concludes that the subject merchandise is of Iranian origin, and not Turkish origin as was claimed at the time of entry. Upon receipt of this report, Mr. Ryan ordered redelivery of the goods because importation of Iranian goods into the United States was prohibited at that time. Mr. Ryan identified *Exhibit C* as the CF ("Customs Form") 4647 that he issued on March 29, 1988, ordering redelivery of the goods. Mr. Ryan also identified *Exhibit M* as the CF 29 (notice of proposed action) he issued on July 22, 1988, notifying Deringer of the potential for countervailing, antidumping, and marking duties.

Mr. Ryan testified that shortly after the subject entry was received in his office, he had the entry withdrawn from the liquidation cycle and identified with a holding code as an entry subject to review. Mr. Ryan identified *Exhibit D* as the automatic liquidation alert report that is received following eight months of an entry remaining unliquidated. This report was processed on October 7, 1988, and lists Entry No. 551–0591232–7. This report alerted Mr. Ryan that the subject entry was approaching its liquidation date and that he either had to liquidate the entry or take action to prevent the entry's liquidation by operation of law. Mr. Ryan testified that he then asked Customs' entry control section to extend the period for liquidation of this entry. Mr. Ryan did so by marking the subject entry, as well as other entries on the automatic liquidation alert report, with the handwritten notation "E1", and forwarding the report to entry control section. Mr. Ryan identified the handwritten notation of "E1" on *Exhibit D* as his request for extension of the subject entry. Mr. Ryan also identified the notation "To Ann * * * 10/25/88" on *Exhibit D* as an instruction to the entry aid who inputs such extensions into Customs' computer system for changing the liquidation status of an entry. Mr. Ryan testified that Ann works in Customs' entry control division in Champlain, and that she would input his extension instructions into the computer with a day or two of receiving them.

Mr. Ryan identified *Exhibit E* as the automatic liquidation alert report processed on November 17, 1988. Notably, the subject entry does not appear on this report. As a result, Mr. Ryan concludes that the liquidation period for the subject entry had been extended.

Mr. Ryan also identified *Exhibit H* as the automatic liquidation alert report processed on October 14, 1989. This report alerted Mr. Ryan that the second anniversary of the subject entry was approaching and that therefore additional action was required. Mr. Ryan identified his handwritten notation of "E04" next to Entry No. 551–0591232–7 on *Exhibit H* as his instruction that the basis for withholding liquidation be changed to a suspension of liquidation for countervailing duties. *Exhibit H* also contains Mr. Ryan's handwritten instructions to "[p]lease extend/suspend all E–1 & E–4 entries."

Mr. Ryan identified *Exhibit I* as the automatic liquidation alert report processed on November 10, 1989. Notably, this report does not list the subject entry. Mr. Ryan stated that this was to be expected because the report was generated after he instructed that liquidation of the subject entry be suspended.

Mr. Ryan also identified *Exhibit F* as a report of entries that had been extended or suspended within the previous nine to twelve months, dated November 17, 1988. This report lists Entry No. 551–0591232–7 as having had the liquidation period extended once.

Mr. Ryan further identified *Exhibit J* as a report of entries that had been suspended as of November 10, 1989. This report lists the subject entry as a countervailing duty entry included among the group of suspended entries. In addition, Mr. Ryan identified *Exhibit K* as a report of entries that had been extended or suspended within the previous nine to twelve months, dated November 10, 1989. This report also lists Entry No. 551–0591232–7 as having been suspended. Finally, Mr. Ryan identified *Exhibit L* as the final liquidation instructions from the U.S. Commerce Department concerning the countervailing duty case on in-shell pistachios from Iran, dated February 1, 1991. Mr. Ryan testified that, as a result of receiving these instructions, he issued another CF 29 notifying the importer that countervailing duties would be assessed in accordance with Commerce's instructions.

The government also called Arthur Versich to the stand. Mr. Versich is a branch chief in the commercial systems development division of Customs' Automated Commercial Systems ("ACS") office located in Washington, D.C. Mr. Versich is responsible for maintaining Customs' automated system for issuing extension and suspension notices. Mr. Versich testified that Customs' extension/suspension sub-program is one of several programs run at the end of each week to produce reports, notices, etc. To sum up Mr. Versich's testimony, an initial computer program is run to canvass all entry master files and extract those files which need to be acted upon in a given week. A second program is then run to extract from those files the entries for which extension or suspension notices must be mailed. The information is saved in a computer file and

put into a print format. This file is then sent to the print spool. During this process, the previous week's file of records for which extension or suspension notices were mailed is erased, and the current week's file is saved. Finally, Customs' extension/suspension history file is updated with the current week's information. Mr. Versich noted that, since 1986, this information concerning the extension or suspension of entries has been available electronically to those importers who have opted to participate in Customs' Automated Broker Interface ("ABI").

Mr. Versich further testified that all of Customs' databases and records reside in Virginia; that is where reports such as the liquidation alert reports identified by Mr. Ryan are generated. The liquidation alert reports are then sent to the import specialists at the various ports to decide what action to take. In this case, the liquidation alert reports were sent to print directly at the port of Champlain. Mr. Versich testified that the import specialist would typically note which entries were to be extended or suspended directly on the report. Then the import specialist would forward the report to the office's entry control operator who would bring up the appropriate ACS screen on the computer system[4] and input whether the import specialist directed an extension or suspension of liquidation. If input of the decision to extend or suspend was successful, the operator would receive a message stating that the entry had been updated. Once the operator inputs the extension or suspension code, this updates the entry's master file and that is how the entry is picked up at week's end by Customs' program as an entry requiring issuance of a notice of extension or suspension of liquidation.

Mr. Versich also testified that, due to sheer volume, Customs does not retain paper copies of extension or suspension notices. Since 1979, Customs has maintained an extension/suspension history file on computer tape; this file indicates those entries for which notices of extension or suspension of liquidation have been issued. Mr. Versich identified *Exhibit N* as a report from Customs extension/suspension history file concerning the subject entry. According to Mr. Versich, *Exhibit N* indicates that four notices were sent. More specifically, notices of extension of liquidation were sent to Deringer and to Fidelity which were processed for printing on October 29, 1989. Notices of suspension of liquidation were sent to Deringer and Fidelity which were processed for printing on November 4, 1989. Mr. Versich concludes that Customs printed and mailed the notices of extension and suspension indicated on *Exhibit N.*

Finally, Mr. Versich testified that in 1989 Customs discovered that, since 1986, approximately 2000 to 3000 suspension notices for entries subject to antidumping or countervailing duties had not been generated and mailed at the appropriate time. Those entries for which notices had not been generated did not appear in Customs' extension/suspension

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[4] In the case of an extension, the operator would bring up the ALQE screen; in the case of a suspension, the ALQS screen was utilized. In either case, the operator would input the entry number; the decision to extend or suspend; and whether the action was requested by the importer or by Customs.

history file at that time. However, once Customs corrected the error and mailed the notices, the extension/suspension history files were updated. Mr. Versich stated that Customs has never had to make any changes to its extension/suspension computer program that involved consumption entries.

On cross-examination, Mr. Versich acknowledged that *Exhibit N* indicates that four notices were scheduled, in that they were queued on the print spool for printing. It does not reflect what was actually printed or any problems that may have been encountered with regard to such printing. According to Mr. Versich, the actual printing of the extension and suspension notices may have occurred on the day following the "Run Date" listed on *Exhibit N.*

Mr. Versich further noted that the data in Customs' extension/suspension history file is not used to supply the reports that are sent to the field. Rather, such reports are based upon the information contained in each entry master file. It is the entry master file that is updated when the branch office's entry control operator inputs the code for extension or suspension of liquidation for a particular entry.

Lastly, the government called Roger Odom to the stand. Since June 1989, Mr. Odom has been employed as supervisor of the production management and computer operation sections for two computer data centers in Virginia. As such, Mr. Odom is responsible for all phases of operation at these data centers, including the generation and mailing of notices of extension or suspension of liquidation which occurs at the older of the two centers. Prior to June 1989, Mr. Odom was responsible solely for law enforcement operations, which occurred at the newer data center. Mr. Odom testified that his current staff of personnel who schedule, generate, and mail notices of extension and suspension of liquidation from the older data center is the same one that Customs employed in 1988 and that, to his belief, the same procedures are employed. The notices at issue in this case would have been issued from that data center.

Mr. Odom testified that his staff utilizes an automated scheduling system called "CA7" that has been pre-programmed to begin the process of generating extension/suspension notices each Saturday; this is but one of many jobs that CA7 initiates. Mr. Odom's staff monitors CA7 and the system to ensure that all jobs are executed and completed successfully. According to Mr. Odom, his staff knows that each program is completed successfully because: (i) CA7 would detect any error; (ii) his staff manually checks the system to ensure success; and (iii) at the end of each program, a number is returned to the system called a "return code". Usually a return code of zero is received, which indicates that the job has been completed successfully. CA7 is instructed to begin the next job only if a return code of zero is received, indicating that the previous job has been completed successfully.

Mr. Odom further testified that the job of generating extension and suspension notices is comprised of several elements. First, the print

spool is created, i.e., the information is placed in a holding area of the printer. If this occurs successfully, a return code of zero is received. The next step is to load the CF 4333–A forms into the printer by means of the pinhole feeds on each side of the form, perform an alignment test, and check on the clarity of the print. Notably, one aspect of the alignment test is to ensure that the name and address of the addressee appears in the proper location on the face of the CF 4333–A envelope.

Once satisfied, the printer operator instructs the system that printing may begin. The operator monitors the printer from start to finish of the job, to ensure that there are no jams and that other problems do not arise. The operator will know that the print job has been completed successfully if a return code of zero is received upon completion. If, however, the printing is interrupted, a return code other than zero is received, and the operator, in conjunction with Mr. Odom's staff, would complete the printing on an alternative printer. In that case, Mr. Odom's staff would ascertain the last form that was successfully printed, access the print spool file, and instruct the system to resume printing the forms at some point prior to the last successfully printed form in order to check for proper alignment, clarity, etc. The duplicate forms are later detached and discarded. The print job is then completed as usual. If both printers should fail to operate properly, the print spool file remains intact and is available to complete the process once a printer is repaired.

Mr. Odom stated that the CF 4333–A forms are fed into the printer in batches numbering approximately 1000. When a batch is depleted, the printer halts and another batch is reloaded into the printer. The operator then instructs the system that printing may resume. According to Mr. Odom, as many as ten boxes of forms may be used each week.

Mr. Odom also testified that, following the successful completion of a print job, the forms are fed into a "decolator" which removes the top sheet, i.e., the alignment sheet, from each of the forms. The forms are then fed through a "burster" which: (i) separates the forms from each other by tearing the perforations found at the top and bottom of each form; and (ii) separates the pinhole feeds located on the sides of each form which are used to feed the forms through the printer. The final product is a stack of postage paid envelopes with an address and return address printed on the face of each and with the appropriate information printed on the inside; this internal printing is achieved because certain areas internal to the envelope comprising CF 4333–A act as carbon paper.

Finally, the stack of completed CF 4333–A forms is placed directly into a mail tray; when a mail tray becomes full, that tray is placed in a mail cart. A postal carrier arrives at the data center each day at 11:00 a.m. and collects the mail, including any CF 4333–A forms that have been placed in mail trays. Mr. Odom testified that, to the best of his knowledge, all notices printed at his facility are mailed successfully.

According to Mr. Odom, the foregoing standard operating procedures have been utilized to generate and mail extension and suspension

notices each week since June 1989 and, to the best of his belief, are identical to the procedures used in 1988. Mr. Odom bases this testimony on his understanding that the documentation associated with the procedures for extension/suspension notices has not changed since at least 1988.

On cross-examination, Mr. Odom testified that the process of generating extension and suspension notices begins on Saturday and normally extends into Sunday of each weekend. Occasionally, this process is not completed until the following Monday or Tuesday. Mr. Odom acknowledged that he does not work weekends, but that on Monday mornings he inquires specifically into whether the extension/suspension notices have been completed.

Mr. Odom further testified that the return code is saved in the computer system log; this is where CA7 looks to determine whether a return code of zero has been received, indicating that the next job may be started. The computer system log is removed nightly and is retained on tape for approximately six months to one year and then destroyed. Consequently, the computer system logs that would indicate whether a return code of zero was received for the notices at issue in this case are no longer available.

Mr. Odom also noted that an alignment sheet contains everything that is printed on the inside of a CF 4333–A. Mr. Odom testified that the alignment sheets were previously retained by Customs but, due to sheer volume, are now discarded. Indeed, since at least June 1989, these alignment sheets have been shredded and then discarded. Consequently, such physical records of the notices at issue in this case are no longer available.

Based upon a review of all of the evidence presented at trial, the court finds that the government has introduced sufficient evidence to invoke the presumption of regularity in this case. The court also finds that the plaintiff has failed to rebut this presumption. Accordingly, the court finds that Customs is presumed to have generated and mailed the notices that are at issue.

II. Conclusions of Law

The court notes that at the time the subject merchandise was imported into the United States, 19 U.S.C. § 1504(a) (1988) stated that, except as provided in subsection (b), an entry of merchandise not liquidated within one year from the date of entry of such merchandise "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record." Pursuant to § 1504(b), however, Customs

> may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as [Customs] shall prescribe in regulations * * *.

Further, with regard to suspension of liquidation, § 1504(c) states that if the liquidation of any entry is suspended,

> [Customs] shall, by regulation, require that notice of such suspension be provided to the importer of record concerned and to any authorized agent and surety of such importer * * *.

The regulations that were promulgated as a result of the foregoing statutory provisions, and which were in effect at the time the subject merchandise was imported into the United States, may be found at 19 C.F.R. § 159.12 (1987). Subsection (b) of this regulation states that "[i]f the district director extends the time for liquidation, * * * he promptly shall notify the importer or the consignee and his agent and surety on Customs Form 4333–A, * * * that the time has been extended and the reasons for doing so." Subsection (c) of this regulation states that "[i]f the liquidation of an entry is suspended as required by statute or court order, * * * the district director promptly shall notify the importer or the consignee and his agent and surety on Customs Form 4333–A, * * * of the suspension."

Legislative history shows that 19 U.S.C. § 1504 was designed to expedite the liquidation process. *See, e.g., Detroit Zoological Society v. United States,* 10 CIT 133, 137 n.9, 630 F. Supp. 1350, 1355 n.9 (1986). Under the statute, Customs is afforded the discretion to choose the "form and manner" of providing notice to the importer of an extension of liquidation. As demonstrated by the regulations, Customs has chosen the ordinary mailing of a Form 4333–A to provide such notice to the importer. There is nothing to indicate that this means of providing notice fails to comply with Customs' statutory mandate.

As the Supreme Court has noted, a letter properly directed that is placed in the mail or delivered to a postal carrier is presumed to have reached its destination and to have been received by the person to whom it was addressed. *Rosenthal v. Walker,* 111 U.S. 185, 193 (1884). Thus, the onus upon the government is to establish proper mailing of the requisite notices; it then falls to the plaintiff to establish nonreceipt. To require the government to prove not only mailing, but actual receipt of Form 4333–A by the importer, would erect a virtually unassailable hurdle. Rarely, if ever, would the government possess or elicit proof of receipt from an importer claiming nonreceipt.

In this case, the court has found that Customs properly generated and mailed the requisite notices of extension and suspension of liquidation. These notices are presumed to have been received by the plaintiff. The court has also found that Deringer failed to establish nonreceipt of the Customs notices at issue. Consequently, judgment will be entered for the defendant.

(Slip Op. 96–132)

CEMEX, S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT AND NATIONAL CEMENT CO. OF CALIFORNIA, DEFENDANT-INTERVENORS

Consolidated Court No. 93–10–00659

[Remand determination remanded.]

(Dated August 13, 1996)

Manatt, Phelps & Phillips (Irwin P. Altschuler, David R. Amerine, Thomas P. Ondeck and *Ronald M. Wisla)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Cynthia B. Schultz), Lucius B. Lau,* Attorney Advisor, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

King & Spalding (Joseph W. Dorn, Martin M. McNerney and *Michael P. Mabile)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This matter is before the court following a remand order. *CEMEX, S.A. v. United States,* Slip Op. 95–72 (Ct. Int'l Trade Apr. 24, 1995) *("CEMEX I").* The court ordered the International Trade Administration of the United States Department of Commerce ("Commerce") to (1) collect "difference in merchandise" ("difmer") data to determine whether sales of Type I cement are suitable for comparison to U.S. sales of Types II and V cement; (2) reconsider Commerce's rejection of Cemex, S.A.'s ("CEMEX") interest income data as untimely; (3) reconsider whether sales to C.L. Pharris ("Pharris") were made at arm's length; and (4) correct the dumping margin calculation to rectify inadvertent errors by Commerce. *Id.* at 31. The court also conditionally remanded three cost issues if Commerce continued to calculate foreign market value ("FMV") on the basis of constructed value. *Id.* Plaintiff objects to the remand determination, arguing that (1) Commerce's difmer adjustment to FMV was unsupported by substantial evidence; (2) Commerce's freight methodology failed to fully account for pre-sale and post-sale freight deductions claimed by CEMEX; and (3) Commerce applied an improper arm's length test to Pacific Coast Cement's ("PCC") sales to Pharris. Defendant-Intervenors also object to the remand determination, contending that (1) Commerce committed an error in the programming of CEMEX's U.S. sales database; (2) Commerce erred in its adjustments for freight expenses; (3) Commerce erroneously calculated the adjustment for home market value-added taxes; (4) Commerce should have calculated an antidumping duty assessment rate to permit Customs to fully account for the absolute amount of antidumping duties; (5) Commerce erroneously failed to convert the value-added tax ("VAT") paid on home market sales to the short ton equivalent before adding that amount to ESP; and (6) Commerce erred in calculating the ESP offset cap for selling expenses.

DISCUSSION

I. *Difmer Adjustment:*

In its remand determination, Commerce determined that Type I cement was "similar merchandise" suitable for comparison to U.S. sales of Type II and V cement. Redetermination on Remand (Feb. 1, 1996) ("Remand Results") at 6. Pursuant to the court's remand order, Commerce requested data concerning the appropriate difmer adjustment to permit the price-to-price comparisons. The statute requires that

> [i]n determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between United States price and the foreign market value * * * is wholly or partly due to * * * the fact that [non-identical] merchandise * * * is used in determining foreign market value, then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4)(C) (1988). Commerce's implementing regulation provides that

> [i]n calculating foreign market value, the Secretary will make a reasonable allowance for differences in the physical characteristics of merchandise compared to the extent that the Secretary is satisfied that the amount of any price differential is wholly or partly due to such difference.

19 C.F.R. § 353.57(a) (1992).

The regulation further provides that Commerce may consider cost of production differences or market value differences which relate to differences in physical characteristics. *Id.* § 353.57(b).

On three separate occasions, Commerce requested that CEMEX submit the necessary data to determine the appropriate difmer adjustment. On May 10, 1995, Commerce issued a questionnaire requesting, *inter alia*, that CEMEX (1) identify all physical differences between Types II and V cement sold in the United States and Type I cement sold in the home market, and (2) provide the total cost of manufacture ("TCOM") and variable cost of manufacture ("VCOM") for Types II and V cement, and the VCOM for Type I cement, noting that the VCOM "should include only those costs that are attributable to physical differences between the U.S. and home market items being compared." Def.-Ints.' Resp. to CEMEX's Comments, App. D at 2. Commerce also requested that CEMEX provide data quantifying the cost differences between the home market comparison merchandise and the U.S. merchandise, including (1) a list of the total materials and direct labor; (2) direct factory overhead cost differences for each comparison product; and (3) a "list of the components or assembly functions that account for these differences in costs, with a full explanation of each listed item." *Id.*

Cemex responded to Commerce's questionnaire on June 14, 1995. Although it claimed a favorable difmer adjustment in that submission, CEMEX failed to provide all of the data requested. Specifically, CEMEX failed to provide (1) the requested difmer information on Type V cement; (2) TCOM data for Type II and V cement; (3) the requested list

of components or assembly functions that accounted for cost differences between the products; and (4) the requested source documents and worksheets supporting all of CEMEX's calculations. Further, no information was provided to establish that cost differences were attributable to the physical characteristics of the products. *Id.*, App. E.

On August 11, 1995, Commerce notified CEMEX of these deficiencies and again requested the necessary data. In addition, Commerce requested, *inter alia,* that CEMEX (1) explain the commercial significance of the differences in chemical composition of the three cement types, listing all variances in chemical requirements, and quantifying, with explanation, the precise effect each difference has upon the VCOM and TCOM; (2) explain in detail any production differences among the cement types that lead to differences in cost; and (3) explain why it allegedly cost more to produce Type I cement than Type II and V cement. *Id.*, App. F.

In its August 24, 1995 response, CEMEX again failed to provide all of the information requested by Commerce. Specifically, CEMEX failed to provide (1) the requested source documents for its reported cost data and production volume for Type I cement; (2) the requested explanation and quantification of the precise effect that the differences in chemical composition have upon the VCOM and TCOM; (3) the requested explanation regarding whether production differences led to differences in cost among the three cement types; and (4) the requested fixed overhead and TCOM data for Type I cement. CEMEX also failed to provide data in response to Commerce's request for information supporting CEMEX's claim that Type I cement cost more to produce than Type II and V cement. Instead, CEMEX simply stated that the "primary difference in the cost per ton of different cement types reflects the varying [weighted-average] efficiencies of the producing plants." *Id.*, App. G, at 6–7.

On September 21, 1995, Commerce made its final request for the necessary difmer data. *Id.*, App. H. CEMEX again inadequately responded to the requests for relevant information. Specifically, CEMEX deleted certain line items in a table requesting plant-specific production cost data to support the weighted-average cost data CEMEX provided on August 24, 1995. A second table requesting the average actual chemical composition of the three cement types was not submitted by CEMEX. Finally, with regard to Commerce's request for information regarding the relative costs of producing Type I and Type II cement, CEMEX only stated that the reduced per-ton cost of production for Type II cement was due to the consolidation of Type II production. *Id.*, App. I.

Based on CEMEX's deficient submissions, Commerce resorted to best information available ("BIA") for the difmer adjustment. CEMEX challenges this determination, asserting it submitted all of the necessary data requested by Commerce and established the physical differences between the different cement types. CEMEX also asserts that it complied with Commerce's requests to account for the differences in the

VCOM attributable to raw material costs, labor costs and variable overhead costs for the different cement types. These claims are refuted by the record. CEMEX repeatedly responded to Commerce's request for complete information with partial, incomplete data. Further, CEMEX failed to establish that the difference in variable costs was tied to the physical differences of the cement types.

CEMEX also contests Commerce's decision to deny a difmer adjustment based on differences in variable overhead costs due to plant efficiencies. CEMEX asserts that this decision is inconsistent with Commerce's rejection of CEMEX's claimed adjustment for excess capacity in the second administrative review, where CEMEX averaged all overhead costs over all of its production. Instead, Commerce required allocation of overhead expenses on a plant-specific basis. This court later affirmed this aspect of Commerce's final results. As indicated, CEMEX failed to demonstrate its entitlement to a difmer adjustment by tying the differences in variable costs to the physical differences of the cement types.

Finally, CEMEX contends that it adequately explained the inconsistency in the difference in production costs for Type I and Type II cement. According to CEMEX, the consolidation of Type II cement during the second review period led to greater relative efficiency of production for Type II cement compared to Type I cement. Commerce, however, noted other evidence from the first administrative review, which was incorporated into the record of the second administrative review, contradicting CEMEX's explanation, such as affidavits indicating that physical differences in the cement types stem from differing raw material mixes, chemical compositions, and fineness. Type II production, as indicated by these earlier submissions, required additional chemical characteristics and additional grinding time to attain the necessary fineness, both of which increased its cost. In any event, CEMEX failed to supply the necessary information to substantiate its claims that increased plant efficiency supported a difmer adjustment in this case. The claimed adjustments were not tied to the actual physical differences in the three cement types. The court finds that Commerce's resort to BIA was justified by CEMEX's unwillingness or inability to fully comply with Commerce's requests for information. 19 U.S.C. § 1677e(c) (1988) (Commerce "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available."); *N.A.R., S.p.A. v. United States*, 741 F. Supp. 936, 941 (Ct. Int'l Trade 1990) ("[I]f a party does not produce the information *as requested*, the ITA is entitled to invoke 19 U.S.C. § 1677e and use best information available.").

CEMEX also challenge's Commerce's selection of BIA. In the remand determination, Commerce determined that, because CEMEX otherwise cooperated in all other aspects of the review, a price-to-price comparison of home market sales of Type I cement and U.S. sales of Type II and V

cement was appropriate, and BIA would be applied only to the missing difmer data. Thus, Commerce applied, "as an adverse assumption, a twenty percent upward difmer adjustment to FMV as best information available." Remand Results at 13.

CEMEX objects to the 20% upward difmer adjustment as "patently unreasonable." The use of a 20% difmer adjustment as BIA has been used in other cases. *See Tapered Roller Bearings, and Certain Components Thereof, from Japan,* 56 Fed. Reg. 26,054, 26,057 (Dep't Comm. 1991) (final results) (applying 20% difmer adjustment as BIA where respondent failed to provide cost data for similar U.S. models), *aff'd, Timken Co. v. United States,* 865 F. Supp. 850, 854 (Ct. Int'l Trade 1994). Commerce has broad discretion in its choice of BIA. *Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185, 1191–92 (Fed. Cir. 1993). Twenty percent is the ceiling for this tier of BIA adjustment, as a difference of more than 20% would result in a finding of dissimilar merchandise unsuitable for price comparisons. As CEMEX did not provide complete information, it cannot demonstrate that the 20% adjustment is in error. Accordingly, the court finds that Commerce's selection of BIA was reasonable, and is supported by substantial evidence.

II. *Freight Methodology:*

Because of cement's low value to weight ratio, freight expense adjustments to price is an important issue in all of the cement cases. In these circumstances Commerce may reasonably expect parties to provide great detail in support of the adjustment. For purposes of price comparison, Commerce adjusted for home market freight expenses, employing a methodology that has been sustained by the court. *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* Slip Op. 95–91, at 5 (Ct. Int'l Trade May 15, 1995), *aff'd,* Slip Op. 95–1485, at 5–7 (Fed. Cir. Aug. 1, 1996). As United States price was based on the exporter's sales price, Commerce adjusted FMV for home market movement charges according to the circumstances of sale ("COS") provision, 19 U.S.C. § 1677b(a)(4)(B).[1] Using this provision, Commerce stated its methodology as follows:

> [W]e adjust only for direct selling expenses, which include post-sale movement expenses and, in some circumstances, pre-sale movement expenses. Specifically, we treat pre-sale movement expenses as direct expenses if those expenses are directly related to the home market sales of the merchandise under consideration. Additionally, under the ESP offset provision we adjust for any pre-sale movement charges found to be indirect selling expenses.

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[1] That provision provides, in relevant part, that Commerce may grant an adjustment to FMV

> if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to * * * other differences in circumstances of sale * * *.

19 U.S.C. § 1677b(a)(4)(B). Commerce's regulation provides:

> In calculating foreign market value, the Secretary will make a reasonable allowance for a *bona fide* difference in the circumstances of the sales compared if the Secretary is satisfied that the amount of any price differential is wholly or partly due to such difference. In general, the Secretary will limit allowances to those circumstances which bear a direct relationship to the sales compared.

19 C.F.R. § 353.56(a)(1).

> In order to determine whether pre-sale movement expenses are direct, [Commerce] examines the respondent's pre-sale warehousing expenses, since the pre-sale movement charges incurred in positioning the merchandise at the warehouse are, for analytical purposes, linked to pre-sale warehousing expenses. If pre-sale warehousing constitutes an indirect expense, then, in the absence of contrary evidence, the expenses involved in positioning the merchandise in the warehouse should also be treated an indirect expense. We note that although pre-sale warehousing expenses in most cases have been found to be indirect expenses, these expenses may be deducted from FMV as a COS adjustment in a particular case if the respondent is able to demonstrate that the expenses are directly related to the sales under consideration.

Remand Results at 19–20 (citation omitted).

In the remand determination, Commerce determined that CEMEX classified its pre-sale warehousing expenses as indirect.[2] *Id.* at 20. Thus, Commerce determined, pre-sale movement charges should also be treated as an indirect expense. CEMEX did not present any substantial evidence demonstrating that its pre-sale movement charges were directly related to sale.

CEMEX argues that Commerce's application of its methodology is improper. Specifically, CEMEX contends that it was improper for Commerce to base it analysis on whether CEMEX's pre-sale freight expenses were directly linked to specific home market sales, as pre-sales expenses varied with the amount sold and CEMEX proffered an allocation methodology attributing all pre-sale freight to home market sales of Type I cement. First, Commerce has not declared this to be a sufficient test for direct expense treatment. Because the court in *Torrington Co. v. United States*, 82 F.3d 1039, 1050 (Fed. Cir. 1996) (cited by CEMEX at oral argument), found post-sales expenses directly related to particular sales, and which varied with amount sold, to be direct expenses, it is inapposite. Second, this argument was specifically rejected by the court in the appeal from Commerce's remand determination in the first administrative review. *See Ad Hoc Comm.*, Slip Op. 95–91, at 5–6 (finding "no conflict with the statute or regulations in the application of [Commerce's] approach"). Third, the linkage to warehouse expenses was upheld in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, Slip Op. 95–1485, at 5–7 (Fed. Cir. Aug. 1, 1996). Thus, CEMEX's argument is without merit.

As for post-sale freight expenses incurred by CEMEX, Commerce used the following methodology:

> Where the point of sale and the producing plant are the same, *and* CEMEX has demonstrated that it has limited its reported freight deduction to sales of Type I cement, (the home market sales the Court required that we include in our analysis), we have deducted all freight incurred on CIF sales, *i.e.*, all post-sale freight, as a direct selling expense.

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[2] CEMEX did not report any post-sale warehousing expenses. Remand Results at 20.

> In those instances where the point of sale and the producing plant are different, if CEMEX has demonstrated that it has limited its reported freight deduction to sales of Type I cement *and* has been able to distinguish adequately between the pre-sale and post-sale components of its freight expenses, we have deducted the post-sale portion as a direct expense, and have treated the pre-sale portion as an indirect expense.
>
> In instances where CEMEX has been unable to provide a breakdown of the pre-sale and post-sale portions of its freight expenses, we have treated all freight costs as indirect expenses.
>
> Finally, if CEMEX has been unable to separate the freight expenses attributable to sales of Type I cement, or to provide an adequate allocation of total freight expenses to sales of Type I cement, we have treated inland freight as an indirect expense.

Remand Results at 22–23.

In the remand determination, CEMEX submitted claims for post-sale freight adjustments for 21 plants and 5 terminals. CEMEX contends that Commerce improperly denied post-sale freight adjustments for 16 of the plants and 3 of the terminals. For these facilities, CEMEX contends that Commerce should have accepted CEMEX's post-sale freight claims as its "allocation methodology used the most specific accounting information available for those points of sale." Pl.'s Comments on Remand Results at 29. Commerce notes, however, that the allocation methodology would have included freight expenses incurred for Type II and Type V cement. As indicated, Commerce's methodology limited post-sale COS adjustments to those associated with sales of Type I cement, as these sales formed the basis of FMV. Further, home market sales of Type II and V cement were found to be outside the ordinary course of trade, because, *inter alia,* Types II and V cement were shipped during the review period over considerably greater distances compared with Type I cement.[3] Thus, Commerce properly rejected CEMEX's allocation methodology.

CEMEX's citation to cases approving of non-distortive allocation methodologies, even though expenses also covered non-subject merchandise, is unavailing. These cases approved of allocation methodologies that apportioned expenses incurred as a fixed percentage of sales, and, thus, were correlated directly with the subject merchandise, *Smith-Corona Group v. United States,* 713 F.2d 1568, 1580 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984), or apportionment was found to be representative and non-distortive of transaction-specific data, *Oil Country Tubular Goods from Korea,* 60 Fed. Reg. 33,561, 33,563 (Dep't Comm. 1995) (final determ. of less than fair value ("LTFV") sales). These circumstances are not present here. The freight expenses varied from sale to sale, from customer to customer, and from product to product. Type II and V cement were found to be outside the ordinary course of trade because unusual freight distances incurred, thus likely distort-

[3] *See Gray Portland Cement and Clinker from Mexico,* 58 Fed. Reg. 47,253, 47,255 (Dep't Comm. 1993) (final results).

ing CEMEX's allocation methodology. Commerce properly denied adjustments for the plants and terminals where CEMEX was unable to separate freight expenses of Type I cement from those of Types II and V.

Defendant-Intervenors challenge Commerce's COS adjustment for CEMEX's post-sale movement expenses for three plants.[4] Commerce determined that freight expenses related to these plants were directly related to sales of Type I cement, as freight expenses were derived from only Type I cements.

Defendant-Intervenors argue that there is no evidence in the record indicating that CEMEX's allocated freight expense for these plants was limited to Type I cement sales. With respect to the Vallejo terminal, CEMEX admitted that the "freight factor was calculated on the basis of several cement types and was not limited to freight costs and shipping weights limited to Type I cement." CEMEX's Rebuttal Comments at 13 n.2. Thus, in accordance with Commerce's methodology, the allocation methodology as to this plant was not viable.

As to the other two plants, Leon and San Luis Potosi, CEMEX admitted at oral argument that non-subject merchandise was shipped from these plants and its data is not limited to Type I sales.[5] Despite its claimed methodology of approving allocations based on Type I sales only, Commerce allowed an adjustment even though non-subject goods (but not Type II or V cement) were involved. On remand Commerce is to determine if the inclusion of this other non-subject data in the allocation was distortive.

Defendant-Intervenors also assert that Commerce erred in allowing an ESP offset adjustment for "indirect" freight expenses. The remand results provide that Commerce classified freight charges as indirect expenses in three instances: (1) for CEMEX's pre-sales freight charges; (2) where CEMEX was unable to segregate pre-sales freight from post-sales freight; and (3) where CEMEX was unable to provide an adequate allocation of freight to sales of Type I cement. Remand Results at 22–23. These expenses were then deducted from FMV pursuant to the ESP offset provision. *See* 19 C.F.R. 353.56(b)(2). Defendant-Intervenors challenge the determination asserting that CEMEX failed to report transaction-specific, customer-specific, or merchandise-specific freight expenses. Defendant-Intervenors further assert that CEMEX failed to show that the allocation methodologies were not distortive.

Commerce responds that the caselaw does not require CEMEX to report indirect expenses on a transaction-specific, customer-specific, or merchandise-specific basis. Indirect selling expenses are, by their nature, not attributable to specific sales; thus Commerce regularly accepts allocations of indirect expenses to sales of in-scope merchandise.

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[4] In its original objections, defendant-intervenors challenged Commerce's adjustment to freight expenses from seven plants. In its reply brief, leave for the filing of which is hereby granted, defendant-intervenors amended their objection, challenging only three plants. According to defendant-intervenors, CEMEX did not claim significant post-sale freight with respect to the other four plants.

[5] CEMEX did not address defendant-intervenors's contention that freight expenses from Leon may have included sales attributed to Leon, but shipped from other plants to the customers.

See, e.g, Fresh Cut Roses from Columbia, 60 Fed. Reg. 6980, 7011 (Dep't Comm. 1996) (final determ. of LTFV sales).

Defendant-Intervenors further asserted at oral argument, that based on *Torrington,* 82 F.3d at 1051, the claimed freight adjustments are failed direct adjustments and failed direct expenses may not be given indirect expense treatment. That is the holding of *Torrington. Id.* Therefore, no *indirect* expense treatment is permissible for post-sales freight expenses which do not qualify for direct sales treatment, for example where the allocation is unacceptable because of mixed cement types. If such expenses do not qualify for direct expense treatment, the adjustment must be denied. Pre-sales freight expenses, because they are not related to particular sales, may receive indirect expense treatment, as long as the allocation methodology is not distortive. This adjustment must be reconsidered in light of *Torrington.* The court does not preclude Commerce from making appropriate direct or indirect freight adjustments on a fair BIA basis wherever that approach may be warranted.

III. *Sales to Pharris:*

During the period of review, CEMEX made sales of cement through its California distributor, PCC, to Pharris, a California producer of ready-mixed concrete. The cement purchased by Pharris was further manufactured into concrete that Pharris sold to its customers. CEMEX acquired Pharris during the review period. For sales subsequent to CEMEX's acquisition of Pharris, Commerce based the calculation of U.S. price on sales of ready-mixed concrete by Pharris to its unrelated customers.

Where the first U.S. sale to an unrelated customer is of a further manufactured product, the statute directs Commerce to adjust the U.S. price by deducting the amount of

> any increased value, including additional material and labor, resulting from a process of manufacture * * * performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

19 U.S.C. § 1677a(e)(3) (1988). Commerce's regulations further provide that the amount of value added in the United States

> generally will [be] determine[d] from the cost of material, fabrication, and other expenses incurred in * * * production [of the further manufactured product.]

19 C.F.R. § 353.41(e)(3).

The question is whether additional profit should be calculated from costs or whether transfer prices should be used because of an unusual fact pattern. In the remand determination, Commerce stated its "long-standing practice in calculating the value added by further processing in the United States is to use the costs of manufacture, and not the transfer prices between related parties in the United States." Remand Results at 14. The value added in the United States calculated by this methodology was then subtracted from the U.S. price.

Nonetheless, Commerce had requested a remand because Pharris had argued that its transfer prices were arm's length prices and did not change after Pharris was acquired. The court granted Commerce's request and ordered Commerce to determine whether the sales were at arm's length. Commerce followed the court's instructions and subsequently determined that PCC's sales to Pharris were not made at arm's length. *Id.* at 15. It used the test ordinarily applicable to home market sales.[6] CEMEX contests the arm's length test and argues that no arm's length test was necessary because the sales price of cement sold by PCC to Pharris did not change as a result of the change in relationship. Commerce rejected these claims as CEMEX did not allege that the arm's length test was distortive or that use of transfer prices would more accurately allocate the profit attributable to U.S. further processing than does Commerce's standard practice. That practice has the additional advantage of avoiding an investigation of the pre-acquisition relations of PCC and Pharris. Commerce made an unnecessary remand request; its prior methodology was acceptable under the statute and regulations.

IV. *VAT Adjustment:*

Defendant-Intervenors challenge the methodology used by Commerce to adjust for value-added taxes imposed on home market sales but not on export sales to the United States. Defendant-Intervenors note that Commerce used the VAT methodology approved by the Federal Circuit in *Federal-Mogul Corp. v. United States,* 63 F.3d 1572 (Fed. Cir. 1995), which defendant-intervenors assert only achieved a tax-neutral result with respect to the calculation of the absolute dumping margin (the difference between foreign market value and U.S. price). The Federal Circuit did not address, defendant-intervenors argue, "the fact that Commerce's methodology does not achieve a tax-neutral result with respect to the dumping margin *percentage* (the difference between FMV and U.S. price, divided by U.S. price)." Def-Ints.' Reply Br. at 7.

The court in *National Steel Corp. v. United States,* Slip Op. 96–97, at 7–13 (Ct. Int'l Trade June 14, 1996), recently rejected this same argument in the context of estimated duties. In that case domestic producers challenged the application of the tax-neutral methodology approved in *Federal-Mogul* to the calculation of the weighted average dumping margin, which serves as the cash deposit rate. *Id.* at 8. The domestic producers asserted that the Commerce's methodology results in a consistent undercalculation of the duty deposit rates. Concluding that the statute did not mandate the precise manner for calculating the cash deposit rate, the court upheld Commerce's methodology as a reasonable interpretation of the statute. "[T]he inherent imprecision of estimating future cash deposit rates would grant Commerce substantial discretion" in the selection of its methodologies. *Id.* at 12.

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[6] Commerce's regulation provides that to compute home market value, Commerce is to use sales to related parties only if prices are comparable to those for unrelated parties. 19 C.F.R. § 353.45(a).

VAT issues have plagued these cases for more than a decade. While this court was in agreement with the *Federal-Mogul* dissent, it must conclude that the *Federal-Mogul* majority understood how dumping margins are applied when it approved Commerce's prior methodology. If the majority did not take these practicalities into consideration, it is for it to say, not this court.[7] As in *National Steel*, the court will not direct a contrary result for purposes of estimation of duty deposits. *See also* discussion in the following section.

V. *Assessment Rate Methodology:*

Defendant-Intervenors also cast their VAT challenge in terms of the assessment rate methodology for the second review period, arguing that Customs' "normal methodology for assessing antidumping duties—multiplying the entered value by the dumping margin percentage—will not assess the full amount of CEMEX's dumping." Def-Ints.' Objections to Remand Results at 26. This issue was not addressed directly in *National Steel*.

The remand determination does not address this issue. In its brief Commerce had erroneously argued that defendant-intervenors had not raised this issue before it. At oral argument Commerce asked for a remand on this issue. The court has a difficult time believing Commerce has not yet figured out the ramifications of its choice of VAT methodology. If it truly did not consider these arguments, however, it was erroneous to reach a decision without doing so. Because the remand determination does not address the weighted average percentage arguments in any way, Commerce is to address this issue both in terms of estimated deposits and assessments, and choose an appropriate methodology.

VI. *ESP Offset Cap for Selling Expenses:*

Defendant-Intervenors alleged that Commerce erroneously calculated the ESP offset cap to be applied to CEMEX's home market sales of cement. Specifically, defendant-Intervenors asserted that in calculating the ESP offset cap, Commerce included U.S. indirect selling expenses for concrete, not for cement. Commerce contends that defendant-intervenors are wrong. According to Commerce, "[n]o concrete indirect selling expenses formed part of the ESP cap." Def.'s Partial Opp'n to Objections at 35. Commerce also set forth an explanation of its formula. Defendant-Intervenors then set forth with specificity in a proposed reply the exact error it was complaining of. Defendant-Intervenors did not press this claim at oral argument, but indicated it would inform the court later of its views. It later submitted a letter indicating the claim was not abandoned and that it was relying on its reply brief. At oral argument leave had not been granted to file a reply brief and counsel's conduct led the court to believe that it was not pressing the arguments made in its reply, as it did not address them specifically. Thus, neither the court nor oppos-

[7] The court notes that the government did not take a position in *Federal-Mogul*'s appeal and, thus, did not provide any guidance to the appellate court on these issues.

ing counsel addressed themselves to the merits of the reply. Ad Hoc's argument should have been set forth with specificity in its original challenge. Even so, it might have been considered had it been pressed at oral argument. It now comes too late. Accordingly, Commerce's adjustment is upheld.

VII. *Programming Error:*

Defendant-Intervenors urge the court to order correction of a programming error that inadvertently changed certain "FRTOUT" values to "O" in Commerce's remand results. After first opposing the correction, Commerce now wishes to amend this clerical error. CEMEX responds that the computer error existed prior to the remand order; thus, defendant-intervenors' claim is untimely. Generally, the court will reject claims regarding inadvertent programming errors where the error was committed during the underlying review but not complained of until Commerce completes its remand. *See Ad Hoc Comm.*, Slip Op. 95–91, at 11.

Defendant-Intervenors assert, however, that the error did not exist in the underlying review, and that they could not have known of the computer programming error prior to remand. Attached to its brief, defendant-intervenors include a portion of the computer program disclosed to it before appeal in this matter. According to defendant-intervenors, the computer program does not contain the error with respect to the deduction of the FRTOUT field in its entirety from ESP. Although not clear from defendant-intervenors's brief, the computer program does manifest an error indicating the incorrect FRTOUT amount was used. Defendant-Intervenors assert that the error likely came about from Commerce's downloading instructions when transferring CEMEX's sales tape to Commerce's computer system. These instructions were not disclosed to defendant-intervenors, and, thus, were undiscoverable. As indicated, however, the error did appear to exist in the computer program disclosed to the parties prior to the remand. Defendant-Intervenors proffered reason for not learning of the error from this data was that "counsel had no reason to suspect that FRTOUT charges had not been deducted from ESP." Def-Ints.' Reply Br. at 12 n.7. Were this the only claim for remand, the court might reject the request as untimely. Because Commerce seeks to correct the error, however, and remand is required for other reasons, the error may be corrected at this stage.

VIII. *VAT Adjustment for Short Tons:*

Defendant-Intervenors assert that Commerce failed to convert the value-added tax paid on home market sales to the short-ton equivalent before adding that amount to FMV or United States price. Commerce agrees to correction of this error. Commerce is directed to correct this on remand.

CONCLUSION

Remand results are due within 45 days hereof. The court deems this time sufficient for Commerce to consult with the parties and with the

court if necessary. Commerce shall make freight expense adjustments in accordance with law, choose appropriate VAT methodologies, and correct the two clerical errors noted. The parties will be deemed to have no new objections to the recalculations unless the objections are filed within five days of filing of the remand results.

(Slip Op. 96–133)

SAARSTAHL AG, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND INLAND STEEL BAR CO., DEFENDANT-INTERVENOR

Consolidated Court No. 93–04–00219

(Dated August 13, 1996)

ORDER

CARMAN, *Judge:* The Court of Appeals for the Federal Circuit having remanded this matter to this Court, *see Saarstahl AG v. United States,* 78 F.3d 1539 (Fed. Cir. 1996), *rev'g and remanding Saarstahl, AG v. United States,* 858 F. Supp. 187 (CIT 1994), and in light of this Court's opinions in *British Steel plc v. United States,* 924 F. Supp. 139 (CIT 1996), *appeals docketed,* Nos. 96–1401 to –06 (Fed. Cir. June 21, 1996), and *British Steel plc v. United States,* Slip Op. 96–130 (CIT Aug. 13, 1996), it is hereby

ORDERED that this case is remanded to the Department of Commerce; and it is further

ORDERED that Commerce shall follow this Court's opinion in *British Steel plc v. United States,* Slip Op. 96–130 (CIT Aug. 13, 1996) in performing its remand determination. Given that the relevant facts appear to be the same as those discussed in that opinion, Commerce may submit a remand determination virtually identical to the remand determination discussed in that opinion; and it is further

ORDERED that Commerce shall file its remand determination with this Court no later than August 19, 1996; and it is further

ORDERED that Commerce, Saarstahl AG, Inland Steel Bar Company, and amicus curiae may each file one submission commenting on the remand determination. Comments shall not exceed five pages. All comments must be filed no later than August 23, 1996.

(Slip Op. 96–134)

INLAND STEEL BAR CO., PLAINTIFF *v.* UNITED STATES DEFENDANT, AND UNITED ENGINEERING STEELS, LTD., DEFENDANT-INTERVENOR

Consolidated Court No. 93–04–00234

(Dated August 13, 1996)

ORDER

CARMAN, *Judge:* The Court of Appeals for the Federal Circuit having remanded this matter to this Court, *see Inland Steel Bar Co. v. United States,* 86 F.3d 1174 (Fed. Cir. 1996), *rev'g and remanding* 858 F. Supp. 179 (CIT 1994), for the reasons set forth in *Saarstahl AG v. United States,* 78 F.3d 1539 (Fed. Cir. 1996), *rev'g and remanding Saarstahl, AG v. United States,* 858 F. Supp. 187 (CIT 1994), it is hereby

ORDERED that this case is remanded to the Department of Commerce; and it is further

ORDERED that on remand, Commerce is to: (1) define "productive unit"; (2) determine whether a "productive unit" is capable of receiving a subsidy under 19 U.S.C. § 1677(5)(B) (1988), as described in *British Steel plc v. United States,* 879 F. Supp. 1254 (CIT 1995), *appeals docketed,* Nos. 96–1401 to –06 (Fed. Cir. June 21, 1996), and *British Steel plc v. United States,* 924 F. Supp. 139 (CIT 1996), *appeals docketed,* Nos. 96–1401 to –06 (Fed. Cir. June 21, 1996); (3) determine whether British Steel Corporation's Special Steels Business was a "productive unit" capable of receiving a subsidy; (4) if Commerce determines the Special Steels Business was a "productive unit" and that a "productive unit" is capable of receiving a subsidy, determine whether subsidies were "provided to" the Special Steels Business prior to the joint venture transaction at issue, and if so, whether this results in countervailing duty liability for United Engineering Steels Limited; (5) if Commerce determines the Special Steels Business was not a "productive unit," was not capable of receiving a subsidy, or that subsidies were not "provided to" the Special Steels Business, determine whether the parties discounted the purchase price at issue to account for any countervailing duty liability otherwise attributable to British Steel Corporation and, if so, whether this results in countervailing duty liability for United Engineering Steels Limited; and it is further

ORDERED that Commerce shall file this remand with the Court no later than August 26, 1996; and it is further

ORDERED that all initial comments on the remand determination must be filed no later than September 3, 1996, and all rebuttals to the comments must be filed no later than September 10, 1996. Parties may not file both initial comments and rebuttals. No comments or rebuttals shall exceed ten pages.

(Slip Op. 96–135)

COMMERCIAL ALUMINUM COOKWARE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–01–00071

Plaintiff moves for summary judgment challenging Customs' classification of unfinished circular glass lids under subheading 7013.39.10, HTSUS, covering "Glassware of a kind used for table, kitchen, * * * other than that of glass-ceramics * * * Pressed and toughened (specially tempered)," dutiable at the rate of 12.5% *ad valorem*, and claims the merchandise is properly classifiable under subheading 7010.90.20, HTSUS, covering "stoppers, lids and other closures, of glass * * * Closures imported separately * * * Produced by automatic machine," dutiable at the rate of 3.7% *ad valorem*. Defendant cross-moves for summary judgment, arguing Customs' classification under subheading 7013.39.10, HTSUS, is correct.

Held: Plaintiff has overcome the presumption of correctness attached to Customs' classification of the subject merchandise under subheading 7013.39.10, HTSUS. The subject merchandise is properly classifiable under subheading 7010.90.20, HTSUS.

(Dated August 13, 1996)

O'Donnell, Byrne & Williams (Michael A. Johnson), R. Kevin Williams, of Counsel, for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Amy M. Rubin), Laura Siegal*, Attorney, Office of the Assistant Chief Counsel, United States Customs Service, of Counsel, for defendant.

OPINION

CARMAN, *Judge:* Plaintiff, Commercial Aluminum Cookware Company, commenced this action to challenge the United States Customs Service (Customs) classification and liquidation of certain merchandise plaintiff imported from Japan. Customs cross-moves for summary judgment requesting the Court deny plaintiff's motion and dismiss the action. The Court granted plaintiff's motion to designate this action a test case pursuant to U.S. CIT R. 84(b) and entered an order to that effect on April 25, 1995. This Court has jurisdiction under 28 U.S.C. § 1581(a) (1988) and this action is before the Court for *de novo* review under 28 U.S.C. § 2640(a)(1) (1988). For the reasons which follow, the Court enters judgment for plaintiff.

BACKGROUND

A. *The Merchandise:*

The merchandise at issue consists of unfinished circular glass lids with stainless steel rims attached and two holes drilled through the top of each lid. (Stipulation of Material Facts as to Which There Is No Genuine Issue to Be Tried (Stip.) ¶ 4.) The unfinished glass lids are made of specially tempered glass, not glass ceramics, and range in size from 16 to 32 cm in diameter. *(Id.* ¶¶ 9, 6.) The lids were manufactured in Japan on automatic machinery and imported in January 1993 separate from any pots or pans or other articles that the lids could be used to cover. *(Id.* ¶¶ 5,

7.) After importation, plaintiff finished the glass lids by attaching stainless steel loop handles though the holes in the top of each lid using rivets and washers. *(Id.* ¶ 8.) The sole use of the finished glass lids is to close and cover cooking vessels. *(Id.* at ¶ 14.) The finished glass lids are marketed and sold exclusively as lids for cooking vessels in plaintiff's Professional Non-Stick line of "Calphalon" cooking vessels. *(Id.* ¶ 11.) The finished glass lids and the cooking vessels with and for which they are sold are principally used in kitchens. *(Id.* ¶ 12.) The glass lids are not used commercially for the conveyance and packaging of liquids or solid products. *(Id.* ¶ 15.)

B. *Statutory Provisions:*

Plaintiff relies on the following provisions of the Harmonized Tariff Schedules of the United States (HTSUS):[1]

7010		Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass:
*	*	* * * * * * *
7010.90		Other:
*	*	* * * * * * *
		Closures imported separately; containers (with or without their closures) of a kind used for the conveyance or packing of perfume or other toilet preparations; other containers if fitted with or designed for use with ground glass stoppers:
7010.90.20		Produced by automatic machine 3.7%

Defendant relies on the following HTSUS provision:

7013		Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018):
*	*	* * * * * * *
		Glassware of a kind used for table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics:
*	*	* * * * * * *
7013.39		Other:
7013.39.10		Pressed and toughened (specially tempered) 12.5%

C. *Customs Service Classification:*

Customs classified the subject merchandise under subheading 7013.39.10, HTSUS. Pursuant to this subheading, Customs imposed duties totaling 12.5% *ad valorem*. Plaintiff filed timely protests to contest Customs' classification. Customs subsequently denied plaintiff's

[1] The HTSUS provisions cited by the Court appear in HTSUS (5th ed. 1993 & Supp. 1).

protests. After having paid all liquidated duties, plaintiff timely commenced this action.

CONTENTIONS OF THE PARTIES

A. *Plaintiff:*

Plaintiff alleges the subject merchandise is provided for *eo nomine* in Heading 7010, HTSUS, and specifically under subheading 7010.90.20, HTSUS.[2] Heading 7010, HTSUS, covers three classes of merchandise, plaintiff argues, which are distinct and independent of one another. Plaintiff asserts the three classes in the heading are set forth as separate nominal clauses and are separated by semicolons: "(1) carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind use [sic] for the conveyance or packing of goods; (2) preserving jars of glass; (3) stoppers, lids and other closures, of glass." (Pl.'s Br. at 10.) Plaintiff claims the use of semicolons to separate classes of merchandise in a heading "is a very old device in tariff law," *(id.* at 11), and plaintiff discusses two cases to demonstrate this point, *(id.* at 11–14 (discussing *J.S. Staedtler, Inc. v. United States,* 2 Cust. Ct. 484, C.D. 183 (1939); *United States v. Palm, Fechteler & Co.,* 4 Ct. Cust. App. 1 (1913)). Additionally, plaintiff reasons, the repetition of the phrase "of glass" is "a precaution which would be unnecessary if it were intended that one read across the semi-colons and attribute qualities of one class to the others," thereby indicating that each description comprises a separate class of merchandise. *(Id.* at 12.)

Turning to subheading 7010.90.20, HTSUS, plaintiff argues that like Heading 7010, HTSUS, the subheading consists of three classes of imported merchandise separated by semicolons: "(1) Closures imported separately; (2) Containers (with or without their closures) of a kind used for the conveyance or packing of perfume or other toilet preparations; (3) Other containers if fitted with or designed for use with ground glass stoppers." *(Id.* at 14–15.) Plaintiff cites the dictionary definition of "closure" and argues the common meaning of "closure" embraces "lid." The subject merchandise consists of "lids," plaintiff argues, as evident from the stipulation and an examination of the samples submitted to the Court. Because "lids" are clearly embraced *eo nomine* within "[c]losures imported separately" of subheading 7010.90.20, HTSUS, plaintiff reasons, and because there are no express limitations—other than that the closures be "of glass" and imported separate from the vessels they close—the subject merchandise is classifiable under subheading 7010.90.20, HTSUS.

Finally, plaintiff points to the Customs Co-Operation Council's *Harmonized Commodity Description and Coding System Explanatory Notes*

[2] Plaintiff explains it does not discuss Customs' classification of the subject merchandise under subheading 7013.39.10, HTSUS, because if plaintiff's claimed classification under Heading 7010, HTSUS, prevails, the merchandise cannot be classified under Heading 7013, HTSUS, as that heading "covers glassware '*(other than that of heading 7010 or 7018).*'" (Mem. in Support of Pl.'s Mot. for Summ. J. (Pl.'s Br.) at 6 (quoting Heading 7013, HTSUS) (emphasis added by plaintiff).)

(Explanatory Notes)[3] to argue the *Explanatory Notes* support plaintiff's construction of the tariff provision. According to plaintiff, "[t]he *Explanatory Notes* make clear that three classes of merchandise are encompassed by the heading [7010, HTSUS]: (1) all glass containers used commercially for the conveyance and packing of goods; (2) preserving jars of glass; (3) stoppers and other closures, of glass." *(Id.* at 21.)

B. *Defendant:*

Defendant responds that because the subject merchandise is used exclusively to cover cooking pots and not for containers used for the conveyance or packing of goods, plaintiff's proposed classification under subheading 7010.90.20, HTSUS, must fail. Defendant argues a review of the terms of Heading 7010, HTSUS, "reveals that it contains words for particular types of containers such as carboys, bottles, jars, ampoules, etc., followed by the general, functionally descriptive, terms 'stoppers, lids and other closures, of glass.'" (Def.'s Br. in Support of Cross-Mot. for Summ. J. & in Opp'n to Pl.'s Mot. for Summ. J. (Def.'s Br.) at 7–8.) Where particular words are followed by general terms, defendant reasons, "the interpretive doctrine of *ejusdem generis* * * * controls the classification of goods within the heading in question." *(Id.* at 8.) Because Heading 7010, HTSUS, contains particular and highly descriptive words such as carboys, bottles, jars, and ampoules followed by the general terms "'stoppers, lids and other closures, of glass,'" defendant concludes, "this heading must be construed according to the doctrine of *ejusdem generis.*" *(Id.)*

Application of *ejusdem generis,* defendant argues, makes it clear the subject merchandise is not covered by Heading 7010, HTSUS, because the imported lids do not share the essential characteristic that unite the items named in the heading. That essential characteristic, according to defendant, is that "each is a type of container commonly used for the conveyance or packing of goods." *(Id.)* Defendant points out that "the glass lids at issue do not share this essential characteristic nor are they used to cover containers which possess such a trait." *(Id.)*[4]

Defendant rejects plaintiff's contention that the semicolon preceding the words "stoppers, lids and other closures, of glass" in heading 7010, HTSUS, indicates a distinct category of merchandise. To the contrary, defendant points out, there are cases where the use of semicolons in tariff statutes did not indicate separate and distinct classes of merchandise. Finally, defendant disputes plaintiff's interpretation of the *Explanatory Notes* and contends its own reading of the *Explanatory Notes* "fully support[s] defendant's position that because the glass lids have no relationship to containers used for the commercial conveyance of goods, they are

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[3] "The Explanatory Notes constitute the Customs Cooperation Council's official interpretation of the Harmonized System." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582.

[4] Defendant also argues *Group Italglass U.S.A., Inc. v. United States,* 17 CIT 226, *reconsideration granted in part,* 17 CIT 373, *petition for permission to appeal denied,* 9 F.3d 977 (Fed. Cir. 1993), determined that a prerequisite for classification under Heading 7010, HTSUS, is that the principal use of imported merchandise be the commercial conveyance or packing of goods. (Def.'s Br. at 10 (footnote omitted).) Because the subject merchandise is designed for use by consumers to cover cooking pots and not to cover glass containers used commercially in the conveyance of goods, defendant reasons, plaintiff's claim must fail. *(Id.* at 10–11.)

not excluded from heading 7013 and they are not included in heading 7010." *(Id.* at 15.)

DISCUSSION

I

Plaintiff claims defendant has misconstrued the effect of the presumption of correctness in this case:

> Defendant * * * states that plaintiff has only made passing reference to the Customs Service's ruling in this matter, as if Customs view of the law were presumed to be correct. Customs interpretation of the law is not presumed to be correct in a classification case* * *. The Court is conducting *de novo* review in this case. It is not bound by the facts found by Customs, although they are presumed to be correct. More important, the Court is not bound by Customs' interpretation of the statute. Determination of whether merchandise falls within a tariff provision is a question of law and is resolved by the Court without deference to Customs' construction, unless specifically adopted by Congress (not a fact in this action).

(Pl.'s Reply to Def.'s Resp. to Pl.'s Mot. for Summ. J. & Resp. to Def.'s Cross-Mot. for Summ. J. at 5–6.) Defendant replies it does not claim the Court is bound by Customs' classification decision.

> The Government recognizes that, although Customs' decisions enjoy a presumption of correctness, the Court's duty in reviewing classification determinations "is to find the *correct* result * * *." Implicit in this function is the Court's responsibility to exercise its own judgment regarding the proper classification of the merchandise under review. Furthermore, the Government's initial brief contains no claim that, in this case, Customs' construction of the law is entitled to deference. Presumption of correctness is a different concept than deference and plaintiff should not presume to use them interchangeably.

(Def.'s Reply to Pl.'s Br. in Opp'n to Def.'s Cross-Mot. for Summ. J. at 8–9 (citations omitted).)

The parties' dispute as to the meaning of the presumption of correctness and recent opinions of the Court of Appeals for the Federal Circuit (Federal Circuit) and the CIT construing the scope of the presumption of correctness prompt this Court to closely examine the role of the presumption of correctness in this case. The starting point is the statute providing for the presumption of correctness.

> **§ 2639 Burden of proof; evidence of value.**
>
> (a)(1) Except as provided in paragraph (2) of this subsection, in any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, *the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct.* The burden of proving otherwise shall rest upon the party challenging such decision.

28 U.S.C. § 2639(a)(1) (1988) (emphasis added).

In *Goodman Mfg., L.P. v. United States*, 69 F.3d 505 (Fed. Cir. 1995), the Federal Circuit reviewed the CIT's grant of the government's cross-motion for summary judgment in an action construing the allowance for recoverable waste under the Foreign Trade Zones Act. In discussing the applicable standard of review, the Federal Circuit stated, "[b]ecause there was no factual dispute between the parties, the presumption of correctness is not relevant." *Goodman*, 69 F.3d at 508.[5] This statement appears to limit the presumption solely to the factual basis of the decision. The statute, however, does not restrict the presumption in this way. Furthermore, case law indicates the presumption applies to more than the facts supporting the decision. Thus, it is not clear to this Court whether the Federal Circuit in *Goodman* intended to modify the practice of applying the presumption of correctness to Customs *decisions* and not merely findings of fact. As discussed below, it seems evident that *decisions* embrace more than findings of fact.

Over 100 years ago, the Supreme Court explained the rationale for a presumption of correctness attaching to the decisions of the Secretary of Treasury and the customs collection agent as follows:

> These officers are, however, selected by law for the express purpose of deciding these questions: they are appointed and required to pronounce a judgment in each case; and the conduct, management, and operation of the revenue system seem to require that their *decisions* should carry with them the presumption of correctness. This rule is not only wise and prudent, but is in accordance with the general principle of law, that an officer acting in the discharge of his duty, upon the subject over which jurisdiction is given to him, is presumed to have acted rightly.

Arthur v. Unkart, 96 U.S. 118, 122 (1877) (emphasis added). The Supreme Court's directive that a presumption attaches to the "decisions" of the Customs officials is repeated in a long line of customs cases. The "actual classification and assessment of duty are the legal functions of the collector. These acts are his decisions and to them attaches the legal presumption of correctness. This is elemental in customs law and requires no citation of authorities." *Bonwit Teller & Co. v. United States*, 19 C.C.P.A. 348, 350–51, T.D. 45500 (1932); *see also St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 768 (Fed. Cir. 1993) ("[W]e must accept the fact that Congress has directed the [CIT] to presume that Customs' decisions are correct and that it is [plaintiff's] burden to prove otherwise.") (citing 28 U.S.C. § 2639(a)(1) (1988)).

Case law consistently describes the presumption as applying to the "ultimate conclusion" of the Customs official as well as the "subsidiary facts" of the decision. *See United States v. New York Merchandise Co.*, 58 C.C.P.A. 53, 58, 435 F.2d 1315, 1318 (1970) ("The presumption of cor-

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[5] Several subsequent opinions of the CIT appear to have adopted this aspect of *Goodman*. *See Central Prods. Co. v. United States*, Slip Op. 96–112 at 2–3 (July 22, 1996); *Haggar Apparel Co. v. United States*, Slip Op. 96–110 at 4 (CIT July 12, 1996); *Sharp Microelecs. Technology, Inc. v. United* States, Slip Op. 96–104 at 5–6 (CIT July 1, 1996); GKD-USA, *Inc. v. United* States, Slip Op. 96–98 at 7–8 (CIT June 17, 1996); *Celestaire, Inc. v. United States*, 928 F. Supp. 1174, 1176 (CIT 1996); and *Marcor Dev. Corp. v. United States*, 926 F. Supp. 1124, 1128 (CIT 1996).

rectness therefore attaches not only to the ultimate conclusion of the Collector that the goods are properly classified in a particular category, but also to every subsidiary fact necessary to support that conclusion."), *cited in S.I. Stud, Inc. v. United States*, 17 CIT 661, 663 (1993), *aff'd*, 24 F.3d 1394 (Fed. Cir. 1994); *Schott Optical Glass, Inc. v. United States*, 82 Cust. Ct. 11, 15, 468 F. Supp. 1318, 1320 (Re, C.J.) ("The presumption of correctness pertains not only to the ultimate conclusion of the classifying official, but also to every subsidiary fact necessary to support that conclusion.") (citation omitted), *aff'd*, 67 C.C.P.A. 32, 612 F.2d 1283 (1979); *Dollar Trading Corp. v. United States*, 67 Cust. Ct. 308, 316, 349 F. Supp. 1395, 1400 (1971) ("The presumption attaches to every subsidiary fact necessary to support [the collector's] ultimate conclusion that the goods were classifiable under that particular category.") (citation omitted).[6]

In light of the foregoing, the Court will examine whether plaintiff in this case has overcome the statutory presumption of correctness that attaches to Customs' decision, including the subsidiary facts and the ultimate conclusion contained therein. Plaintiff must overcome the presumption by a preponderance of the evidence. *St. Paul Fire & Marine Inc. Co.*, 6 F.3d at 769. Where as here there are no material facts in dispute and only questions of law remain—for example, Customs' interpretation of a tariff provision—plaintiff must show legal error to overcome the presumption of correctness. *See Mita Copystar Am. v. United States*, 21 F.3d 1079, 1084 (Fed. Cir. 1994) ("[A]bsent a showing of legal error in the construction of a tariff term, we, like the trial court, should uphold a Customs' classification decision."); *Marubeni Am. Corp. v. United States*, 915 F. Supp. 413, 419 (1996) ("Absent a showing of legal error in the construction of the [tariff term], Customs' classification decision must be upheld.") (citing *Mita Copystar)*. If the Court finds because of evidence or other authority presented by plaintiff that the presumption has been overcome, the Court must reach the correct classification on its own or after remand to the agency. *See Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 74–75, 733 F.2d 873, 878, *petition for reh'g denied*, 2 Fed. Cir. (T) 97, 739 F.2d 628 (1984).

Although "[i]n some cases, the government's classification may be so patently incorrect that the importer can overcome the presumption of correctness without producing a more satisfactory alternative," *Jarvis Clark Co.*, 2 Fed. Cir. (T) at 75, 733 F.2d at 878, "[t]he best proof that a customs classification is wrong is proof that a different classification is

[6] In practice, Customs' classification decision is based in part on the actions of an import specialist at Customs, who is assigned particular lines of merchandise in which he or she becomes an expert. Ruth F. Sturm, *Customs Law & Administration* § 7.2 at 31 (Supp. 1996). In classifying merchandise, the import specialist "gathers information from examination of the merchandise, the explanatory information in the Tariff Classification Study, [Customs Information Exchange] circulars, the Customs Bulletin, and other Government publications." *Id.* The import specialist also learns about the line of merchandise from trade organizations and through practical experience in dealing with regular importations of the merchandise, and becomes familiar with the laws and regulations applicable to that line. In the end, "[t]he proper classification of merchandise may involve questions of law, such as the construction of the pertinent tariff provisions and their application to the imported merchandise, and questions of fact, such as what the merchandise actually is, its component material of chief value, its chief use, how it is dealt in trade." *Id.* § 50.1 at 3 (Supp. 1995).

right, or at least preferable," *Jarvis Clark Co.*, 2 Fed. Cir. (T) at 99, 739 F.2d at 630.

II

This case is before the Court on motions for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." U.S. CIT R. 56(d). The parties' stipulation defines the goods at issue. This case does not present any genuine issue of material fact. The two issues that remain are: (1) whether plaintiff has overcome the presumption of correctness attaching to Customs' classification of the subject merchandise, under subheading 7013.39.10, HTSUS, covering "Glassware of a kind used for table, kitchen, * * * other than that of glass-ceramics * * * Pressed and toughened (specially tempered)," dutiable at the rate of 12.5% *ad valorem;* and (2) whether the imported merchandise is dutiable under subheading 7010.90.20, HTSUS, covering "stoppers, lids and other closures, of glass * * * Closures imported separately * * * Produced by automatic machine," dutiable at the rate of 3.7% *ad valorem,* as claimed by plaintiff.

It is arguable the subject merchandise is covered under subheading 7013.39.10, HTSUS, as "Glassware of a kind used for table, kitchen, * * * other than that of glass-ceramics * * * Pressed and toughened (specially tempered)," as classified by Customs.[7] However, if the subject merchandise is properly classifiable under heading 7010, HTSUS, as claimed by plaintiff, then Customs' classification must yield as heading 7013, HTSUS, covers certain glassware "(other than that of heading 7010 or 7018)." Therefore, plaintiff overcomes the presumption of correctness attaching to Customs' classification under subheading 7013.39.10, HTSUS, simply by establishing that the subject merchandise is properly classifiable under Heading 7010, HTSUS. *See Group Italglass,* 17 CIT at 227.

The crux of the dispute here is whether each listing of items in Heading 7010, HTSUS, separated by semicolons, constitutes a separate class of merchandise. Plaintiff contends they do and defendant argues otherwise. The Court finds plaintiff has the better argument for the following reasons. First and foremost, the plain language of the tariff provision dictates this result. The first group of merchandise listed in Heading 7010, HTSUS, is "Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods." This class does have qualifying language in that not *all* carboys,

[7] In construing tariff terms, "the court may rely upon its own understanding, dictionaries and other reliable sources." *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995) (citing *Marubeni Am. Corp. v. United States*, 35 F.3d 530 (Fed. Cir. 1994)). "Glassware" is defined as "articles made of glass." *Webster's Third New International Dictionary* 963 (1986). The parties agree "[g]lass imparts the essential characteristic to the imported merchandise," (Stip. ¶ 10), and therefore the merchandise could be properly defined as an "article of glass" and within the definition of "glassware." The parties agree the imported merchandise is "made of specially tempered glass, but not of glass ceramics," (*id.* ¶ 9), and when finished, is "principally used in kitchens," (*id.* ¶ 12). Accordingly, a plausible argument could be made the subject merchandise falls within subheading 7013.39.10, HTSUS.

bottles, flasks, etc., are covered by the heading, but only those "of glass" and "of a kind used for the conveyance or packing of goods." A plain reading of the heading reveals these limitations only apply to those items that precede the qualifying language. The second group of merchandise, "preserving jars of glass," is also qualified in that only glass preserving jars are covered. There is no language in the statutory provision dictating that the "preserving jars of glass" be limited to those "preserving jars of glass" that are "of a kind used for the conveyance or packing of goods." The only qualification is that the jars be "of glass." The third group of merchandise, "stoppers, lids and other closures, of glass" is limited only in the sense that the "stoppers, lids and other closures" must be of glass to be covered. There is no language directing that the "stoppers, lids and other closures" be "of a kind used for the conveyance or packing of goods." If the drafters of the tariff provision meant for the qualifying language in the first class of merchandise to be read throughout the heading, they were perfectly capable of including such language at the end of the heading as is commonly done in other tariff provisions.[8] Furthermore, if the qualifying language in the first class of merchandise was intended to be read into the other two classes, there would have been no need to repeat "of glass" in each of the subsequent classes. The Court presumes all statutory language serves a purpose, *see Bailey v. United States,* 116 S. Ct. 501, 506–07 (1995) ("'Judges should hesitate * * * to treat [as surplusage] statutory terms in any setting * * *.'") (bracketed text in original) (citation omitted); *Application of Barker,* 559 F.2d 588, 591–92 (C.C.P.A. 1977), *cert. denied,* 434 U.S. 1064 (1978) ("As a principle of statutory construction, it is presumed that Congress did not use superfluous words.") (footnote citing cases omitted), and therefore, the Court finds this repetition of some significance.

Second, the semicolons dividing the classes of merchandise in Heading 7010, HTSUS, create a wall around each grouping of items preventing the qualifying language from one grouping from applying to another. This use of semicolons is consistent with grammatical rules on the principal use of the semicolon—to separate *independent* clauses of a sentence.[9] In light of the foregoing, the Court finds the tariff provision describes three classes of merchandise in Heading 7010, HTSUS, and the qualifying language of one class does not apply to the merchandise listed in the other classes in the heading.

The provision for "stoppers, lids" in Heading 7010, HTSUS, is an *eo nomine* designation, "which describes a commodity by a specific name,

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[8] For example, 3924.90.10, HTSUS, provides for "Curtains and drapes, including panels and valances; napkins, table covers, * * * slipcovers; *and like furnishings.*" (Emphasis added.) Although the two classes of merchandise in the subheading are separated by semicolons, it is clear the underscored language is meant to apply across both classes of merchandise.

[9] *See The Chicago Manual of Style* ¶ 5.89 (14th ed. 1993) (A semicolon "should always be used between the two parts of a compound sentence (independent, or coordinate, clauses) when they are not connected by a conjunction * * *."); Edward D. Johnson, *The Handbook of Good English* § 2–11 at 121 (1991) ("The semicolon has two main uses: to separate independent parts of a sentence, and to separate elements of a series when some of the elements already contain commas."); *Webster's* ¶ 5.1.3 at 47a ("As a strong comma a semicolon usually separates phrases or clauses that are themselves broken up by punctuation * * *.").

usually one well known to commerce." *See* Sturm § 53.2 at 3 (Supp. 1995) (citing *United States v. Bruckmann*, 65 C.C.P.A. 90, 582 F.2d 622 (1978)). "[I]t is basic that if merchandise is specified *eo nomine*, the *eo nomine* provision prevails over one that is general or less specific." *Economy Cover Corp. v. United States*, 76 Cust. Ct. 130, 134, C.D. 4645 (1976). In their stipulation of material facts, the parties repeatedly refer to the imported merchandise as "unfinished glass lids," *(see* Stip. ¶¶ 7–9), or as "glass lids," *(see id.* ¶¶ 5, 6). The predecessor court to the Federal Circuit stated over 60 years ago:

> The clear weight of the authorities on the subject is that an *eo nomine* statutory designation of an article, without limitations or a shown contrary legislative intent, judicial decision, or administrative practice to the contrary, and without proof of commercial designation, will include all forms of said article.

Nootka Packing Co. v. United States, 22 C.C.P.A. 464, 470, T.D. 47464 (1935) *(cited in The Brechteen Co. v. United States*, 6 Fed. Cir. (T) 154, 158, 854 F.2d 1301, 1304 (1988)); *see also Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992) ("Tariff terms contained in the statutory language 'are to be construed in accordance with their common and popular meaning, in the absence of contrary legislative intent.'") (citation omitted). The Court finds there are no limitations or contrary legislative intent excluding the imported merchandise from the *eo nomine* designation in Heading 7010, HTSUS. Accordingly, the Court holds the subject merchandise is *eo nomine* within the class of merchandise designated as "stoppers, lids and other closures, of glass" in Heading 7010, HTSUS.[10]

Turning to subheading 7010.90.20, HTSUS, claimed by plaintiff, the Court finds the subject merchandise is covered by the subheading, which provides for "Closures imported separately * * * Produced by automatic machine." The parties agree the subject merchandise was imported separately, (Stip. ¶ 7), and was produced by automatic machine, *(id.* ¶ 5). There is little doubt the imported lids are "closures" as that term is used in the tariff provision. The common meaning of "closures" encompasses the imported merchandise. *See Webster's* at 428 [5a] (defining "closure" in part as "a means of filling a space or gap [especially] by sealing it or of closing an opening * * * a cap, lid, or other form of stopper on or in a container [especially] for sealing it"). As "[t]ariff terms are construed according to their common and commercial meanings," *Simod Am. Corp. v. United States*, 7 Fed. Cir. (T) 82, 86, 872 F.2d 1572, 1576 (1989), the Court finds the subject merchandise are

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[10] Defendant's arguments sounding in *ejusdem generis* have no merit. The doctrine of *ejusdem generis* is a tool of statutory construction providing that

> when general words in a statute follow a specific enumeration of persons or things, the general words are not to be construed in their widest sense or meaning, but rather are to be limited, or held to apply, only to persons or things of the same kind or class as those specifically enumerated.

Economy Cover Corp., 76 Cust. Ct. at 132. Because the Court holds a plain reading of the tariff provision provides *eo nomine* for the imported merchandise, resort to *ejusdem generis* is not necessary. *See Neco Elec. Prods. v. United States*, 14 CIT 181, 190 (1990) (Re, C.J.) ("As with all principles or canons of statutory interpretation, *ejusdem generis* is used only as an instrumentality for determining the legislative intent in cases where it is in doubt.") (quotations and citation omitted).

"closures" as that term is used in the tariff provision. In conclusion, the Court holds the subject merchandise is properly classified under subheading 7010.90.20, HTSUS, covering "stoppers, lids and other closures, of glass * * * Closures imported separately * * * Produced by automatic machine," dutiable at the rate of 3.7% *ad valorem*.

CONCLUSION

Plaintiff has overcome the presumption of correctness attached to Customs' classification of the subject merchandise under subheading 7013.39.10, HTSUS. The subject merchandise is properly classifiable under subheading 7010.90.20, HTSUS.

(Slip Op. 96–136)

FORMER EMPLOYEES OF DIGITAL EQUIPMENT CORP., PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 94–07–00404

Plaintiffs challenge *Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance, TA-W–29,304; Digital Equipment Corp., Roxbury, MA,* 59 Fed. Reg. 12,983 (Dep't Labor 1994), and *Digital Equipment Corp., Roxbury, Massachusetts; Negative Determination Regarding Application for Reconsideration,* 59 Fed. Reg. 26,518 (Dep't Labor 1994).

Held: Labor's decision to deny plaintiffs' eligibility to apply for trade adjustment assistance and Labor's denial of plaintiffs' application for reconsideration are based on substantial evidence and are otherwise in accordance with law. Plaintiffs' motion for judgment on the agency record is denied. This action is dismissed.

(Dated August 13, 1996)

Barnes, Richardson & Colburn (Christopher E. Pey), for plaintiffs.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Randi-Sue Rimerman), Annaliese Impink,* Office of the Solicitor, United States Department of Labor, of Counsel, for defendant.

OPINION

CARMAN, *Judge:* Plaintiffs challenge the determination by the United States Department of Labor (Labor) that plaintiffs are ineligible to apply for adjustment assistance for workers under 19 U.S.C. § 2272 (1988 & Supp. V 1993). This Court has jurisdiction pursuant to 28 U.S.C. § 1581(d)(1) (1988) and, for the reasons which follow, enters judgment for defendant.

BACKGROUND

Digital Equipment Corporation (Digital) is a large multi-plant conglomerate operating several plants throughout the United States. The

subject firm in this action is the facility in Roxbury, Massachusetts—known as the Boston or Roxbury plant—which manufactured various computer products including video, keyboards, small computer systems, and cable assemblies. The Roxbury plant produced mainly the LK201 keyboard and cable assemblies used internally by other Digital facilities. All production on the LK201 keyboards at the plant ceased in March 1992. The workers who were not laid off at that time were transferred to the production of cable assemblies at the plant. Subsequently, cable assemblies were discontinued in 1993 as an end-of-life item. Although the plant was officially closed in December 1992, phase-down activities extended to mid-1993, and all other production at the Roxbury plant was either moved to other corporate domestic plants or discontinued.

On November 15, 1993, several former employees of the Roxbury plant petitioned Labor for trade adjustment assistance on behalf of workers at the plant. The petition alleged that beginning in 1991 approximately 200 to 300 keyboard manufacturing workers were separated due to increased imports. The petition further alleged that beginning in 1993 the same number of cable sub-assembly workers were separated due to increased imports.

In response to plaintiffs' petition, Labor initiated an investigation to determine whether plaintiffs were eligible for certification for trade adjustment assistance. After conducting its investigation, Labor found: (1) employment at the firm declined or threatened to decline during the relevant period; (2) sales at the firm declined significantly; and (3) production at the firm declined significantly. R. at 29. Labor concluded, however, that plaintiffs were ineligible for certification. *Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance, TA-W–29,304; Digital Equipment Corp., Roxbury, MA,* 59 Fed. Reg. 12,983 (Dep't Labor 1994) *(Negative Determination).* Labor found plaintiffs did not satisfy one of the three criteria necessary to be eligible for certification, namely a showing "[t]hat increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production." *Id.* Specifically, Labor concluded "[a]ny separations at Digital Equipment Corp., Roxbury, MA were due to a corporate decision to cease operations at that facility and outsource production to other domestic companies." *Id.*

On March 31, 1994, plaintiffs requested Labor reconsider its negative determination, because certain "facts and circumstances * * * were either in error, missing, or not clearly presented in the original, hastily filed petition." R. at 44 *(Application for Reconsideration).* The *Application for Reconsideration* provided additional information on the number and types of workers allegedly affected by increased imports as well as an expanded breakout of the products involved. Additionally, plaintiffs retracted the allegation in their original petition that cable sub-as-

semblies were one of the products harmed by imports and claimed keyboards were the only product impacted by increased imports. The *Application for Reconsideration* also set forth a detailed description of plaintiffs' reasons for believing increased imports caused a decline in the sales or production of keyboards at Digital. In response, Labor undertook further investigation, which included telephone conferences with the former plant manager of the Roxbury plant, Digital's keyboard product manager, and a senior legal assistant at Digital.

On May 20, 1994, Labor published its denial of plaintiffs' request for reconsideration:

> The findings show that all production on the LK201 keyboards ceased in March, 1992 and the plant closed in December 1992. Cable assemblies were then produced but were discontinued in 1993 as an end-of-life item. All other production at Roxbury was either moved to other corporate domestic plants or discontinued. These events would not provide a basis a [sic] group certification.
>
> The Department's denial was based on the fact that the "contributed importantly" test of the Worker Group Eligibility Requirements of the Trade Act was not met. The findings show that a corporate decision was made to cease operations at Roxbury and outsource production for a newer generation of keyboards to other domestic companies.
>
> Neither a domestic transfer nor technological unemployment would form a basis for a worker group certification. Also, the allegation that a domestic vendor is currently importing keyboards for Digital would not provide a basis for certifying keyboard workers laid of [sic] in March, 1992. Section 223(b)(1) of the Trade Act does not permit the Department to certify workers laid off more than one year prior to the date of the petition, which in this case is November 15, 1993.

Digital Equipment Corp., Roxbury, Massachusetts; Negative Determination Regarding Application for Reconsideration, 59 Fed. Reg. 26,518 (Dep't Labor 1994) *(Reconsideration Notice).*

Contentions of the Parties

Plaintiffs contend Labor's decisions denying certification were based on an erroneous interpretation of plaintiffs' claim, and further that Labor "misconstrued what evidence it did have, failed to conduct an adequate investigation, and ignored completely plaintiffs' allegations that the keyboards produced at the Roxbury plant were replaced with keyboards manufactured in Mexico." (Mem. in Supp. of Pls.' Mot. for J. on the Agency R. (Pls.' Br.) at 6.) First, plaintiffs argue the *Negative Determination* "lacks any type of reasoned analysis, other than that keyboards were outsourced to 'other domestic companies,'" and begs the question by stating the Roxbury plant was closed due to a "'corporate decision.'" *(Id.* at 7.) There is no evidence, plaintiffs claim, that Labor considered whether the production outsourced to other domestic companies remained in the United States or went elsewhere.

Second, plaintiffs contend Labor erroneously believed plaintiffs were requesting certification for those workers terminated just before keyboard production shut down in March 1992. Plaintiffs argue they never made such a claim. Because workers laid off more than one year prior to the date of the petition cannot be certified, plaintiffs contend this misconception led Labor to wrongly conclude plaintiffs could not be certified.

Third, plaintiffs insist "the fact that at the time their employment was terminated plaintiffs were no longer making the product that was replaced by imports is not in itself a proper basis for denial of certification." *(Id.* at 9 (citing *Former Employees of General Elec. Corp. v. United States Dep't of Labor,* 14 CIT 608 (1990)).) Plaintiffs argue that under *Former Employees of GE,* "production workers who continue working well after termination of production of the product affected by increased imports can qualify for adjustment assistance." *(Id.* at 10 (citation omitted).)

Fourth, plaintiffs assert Labor's finding that plaintiffs' jobs were lost due to technological obsolescence is completely erroneous. The only evidence of obsolescence, plaintiffs suggest, pertains to cable assemblies that were terminated as end-of-life. If this is the basis for Labor's denial of certification, plaintiffs continue, "it is erroneous because * * * plaintiffs have always claimed that they lost their jobs primarily due to keyboard imports, not due to the end of production of cable assemblies." *(Id.* at 11.) Finally, plaintiffs contend Labor's investigation was "completely inadequate" as the agency never questioned or corroborated Digital's answers to Labor's questionnaire.

Labor rejects plaintiffs' arguments and responds the appropriate inquiry is whether an increase in imports of an article like or directly competitive with an article produced by the separated workers *at the time of* their separation contributed importantly to that separation. (Def.'s Mem. in Opp'n to Pls.' Mot. for J. Upon the Agency R. at 10.) At the time of their separations, Labor contends, plaintiffs were engaged in the manufacture of cable assemblies—not keyboards. Accordingly, Labor asserts it correctly investigated whether the termination of cable assembly production at the Roxbury plant was due to an increase in cable assembly imports. Labor argues substantial evidence reveals that cable assemblies were ultimately terminated as an end-of-life item. "Because there was no evidence that plaintiffs lost their jobs due to increased competition from imported cable assemblies, the Secretary appropriately concluded that plaintiffs' separations were due to a corporate decision to cease operations" at the Roxbury plant. *(Id.* at 9–10.)

Labor argues plaintiffs' allegation that Digital's keyboard production was replaced by imports is irrelevant.[1] Labor contends *Former*

[1] As to plaintiffs' second argument, Labor contends plaintiffs misread the *Reconsideration Notice* in arguing Labor erroneously believed plaintiffs were seeking certification for workers terminated at the time keyboard production was shut down. Labor insists that when read in the context of the entire decision and in conjunction with the agency record, the agency correctly concluded an investigation concerning the replacement of keyboards with imports was unnecessary as those workers separated when the production of keyboards ceased were ineligible for assistance pursuant to 19 U.S.C. § 2273(b).

Employees of GE, and another worker adjustment assistance case, *Paden v. United States Dep't of Labor,* 562 F.2d 470 (7th Cir. 1977), teach "that certification should be denied if at the time of their separation the petitioning workers are engaged in the production of a different product than the product replaced by imports, and the production of that different product ends for a reason other than an increase in import competition." *(Id.* at 12–13.) Because plaintiffs were engaged in the production of cable assemblies and not keyboards at the time of their separation, Labor argues, the agency "correctly investigated whether the termination of cable assembly production at the Boston plant was due to an increase in cable assembly imports." *(Id.* at 10–11.)

Finally, Labor rejects plaintiffs arguments impugning the adequacy of the agency's investigation. The Secretary

> contacted Digital personnel and accepted as credible their explanation that cable assemblies were ultimately discontinued as an end-of-life item. The information relied upon by the Secretary came in part from the former plant manager of the Boston plant, an individual who was in a position to know the reason for cable assembly production termination and to be impartial.
>
> Nothing in the administrative record of the investigation contradicts this finding. In fact, plaintiffs concede that substantial evidence in the record exists to support Labor's finding that the production of cable assemblies was terminated due to technical obsolescence.

(Id. at 13–14 (citing Pls.' Br. at 11).)

Standard of Review

A determination by Labor denying certification of eligibility for trade adjustment assistance benefits will be upheld if it is supported by substantial evidence on the record and is otherwise in accordance with law. *See Woodrum v. Donovan,* 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd,* 2 Fed. Cir. (T) 82, 737 F.2d 1575 (1984). Labor's findings of fact are conclusive if supported by substantial evidence. 19 U.S.C. § 2395(b) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).

Discussion

To certify workers as eligible to apply for trade adjustment assistance benefits, Labor must determine the workers meet the following three criteria:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and

> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a) (1988 & Supp. V 1993). There is no dispute plaintiffs in this action satisfied the first two criteria. The issue before the Court is whether Labor's determination that plaintiffs were ineligible for certification because they failed to satisfy the third criterion is based on substantial evidence on the record and is otherwise in accordance with law.

Labor investigated both keyboard and cable assembly production at the Roxbury plant to determine if increased imports had any impact on the sales and production of these products and plaintiffs' subsequent job separations.[2] *See* R. at 14, 18. Labor found cable assemblies were discontinued as an end of life item. *Reconsideration Notice,* 59 Fed. Reg. at 26,518. As to keyboard production, Labor concluded, "a corporate decision was made to cease operations at Roxbury and outsource production for a newer generation of keyboards to other domestic companies." *Id.* Evidence on the record supports these findings:

> As Digital's overall business strategy changed, the products at the Boston Plant were no longer part of this strategy. Manufacture of the products at this plant was not cost competitive so management decided to outsource production of these products to other U.S. companies. Manufacture of the keyboard * * * was phased out as Digital moved to a new generation of systems. Digital began purchasing these products from other U.S. vendors. The cable business never took hold at Boston, and * * * this product was end of life—discontinued. Any other work that was performed at the Boston Plant was either moved to another plant within the U.S., or discontinued.

R. at 19 (quotations omitted). Labor concluded "[n]either a domestic transfer nor technological unemployment would form a basis for a worker group certification." *Reconsideration Notice,* 59 Fed. Reg. at 26,518. There is legal support for Labor's reasoning that a domestic transfer of production would not form a basis for certification under the facts of this case, *see Former Employees of Baker Perkins v. United States,* 13 CIT 632, 635–36 (1989), and evidence reveals a domestic transfer of production occurred in this case. *See* R. at 19. Additionally, Labor's conclusion that technological unemployment alone would not form a basis for certification is in accord with precedent. *See Miller v. Donovan,* 9 CIT 473, 480, 620 F. Supp. 712, 719 (1985) (Re, C.J.) ("The [statute] does not extend benefits to those whose place of employment is closed because of technological obsolescence.") (citation omitted). Accordingly, Labor's determination that increases of imports did not

[2] In their original petition, plaintiffs alleged increased imports hurt the sales or production of both keyboard manufacturing and cable sub-assembly production. In their *Application for Reconsideration,* however, plaintiffs retracted the allegation concerning cable sub-assembly production and only alleged keyboard sales or production were harmed by increased imports.

"contribute [ ] importantly" to plaintiffs' separations is based on substantial evidence and is otherwise in accordance with law.[3]

Plaintiffs' attacks on the adequacy of Labor's investigation also lack merit. The record indicates Labor officials held telephone conferences with a senior legal assistant at Digital and other Roxbury plant managers, received correspondence from Digital in response to an information request from Labor, and prepared an "Investigative Report" summarizing the findings of its investigation, which included a review of relevant import data in the official trade statistics. "It is well-settled law that the nature and extent of an investigation are matters resting within the sound discretion of administrative officials," *Former Employees of VTC Inc. v. Reich*, 17 CIT 1433, 1437 (1993) (citation omitted), and the "Court must give substantial deference to the method chosen by the agency to fulfill its statutory responsibility," *Former Employees of CSX Oil & Gas Corp. v. United States*, 13 CIT 645, 651, 720 F. Supp. 1002, 1008 (1989) (citation omitted). The Court finds no fault with the adequacy of Labor's investigation in this case.

CONCLUSION

The Court holds Labor's decision to deny plaintiffs' eligibility to apply for trade adjustment assistance and Labor's denial of plaintiffs' application for reconsideration are based on substantial evidence and are otherwise in accordance with law. Plaintiffs' motion for judgment on the agency record is denied.

[3] Whether at the time of their separations plaintiffs were producing cable assemblies, as defendant argues, or engaged in phase-out activities related to keyboard production, as plaintiffs argue, need not be decided because under either scenario, Labor found increased imports did not "contribute [ ] importantly" to plaintiffs' separations.

(Slip Op. 96–137)

CRESWELL TRADING CO., INC. SOUTH BAY FOUNDRY 1989, D & L SUPPLY CO., SOUTHERN STAR, INC., CITY PIPE & FOUNDRY, INC., CAPITOL FOUNDRY OF VIRGINIA, INC., VIRGINIA PRECAST CORP., AND TECHSALES, INC., PLAINTIFFS, AND CRESCENT FOUNDRY CO. P. LTD., SELECT STEELS, LTD., RSI (INDIA) PVT. LTD., KEJRIWAL IRON & STEEL WORKS, GOVIND STEEL CO., LTD., R.B. AGARWALLA & CO., SERAMPORE INDUSTRIES P. LTD., SUPER CASTINGS (INDIA), CARNATION ENTERPRISES P. LTD., UMA IRON & STEEL CO., AND COMMEX CORP., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND ALLEGHENY FOUNDRY CO., CAMPBELL FOUNDRY, CO., DEETER FOUNDRY, INC., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY, INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., PINKERTON FOUNDRY, INC., U.S. FOUNDRY & MANUFACTURING CO., VULCAN FOUNDRY, INC., AND ALHAMBRA FOUNDRY, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 91–01–00012

[Commerce's final countervailing duty determination sustained in part and remanded in part.]

(Dated August 15, 1996)

Manatt, Phelps & Phillips (Irwin P. Altschuler and *Ronald M. Wisla)* and *White & Case (Walter J. Spak* and *Vincent Bowen)* for plaintiffs.

Cameron & Hornbostel (Dennis James, Jr.) for plaintiff-intervenors.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Velta A. Melnbrencis)* and *Robert E. Nielsen,* Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal and *Robin H. Gilbert)* for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

DICARLO, *Chief Judge:* Plaintiffs, Plaintiff-Intervenors and Defendant-Intervenors move for a third remand, contesting certain aspects of the Department of Commerce's second remand determination countervailing certain portions of the subsidy provided to Indian castings exporters under India's International Price Reimbursement Scheme (IPRS). *Final Results of Redet. Pursuant to Court Remand, Creswell Trading Corp., Inc. et. al. v. United States,* Slip Op. 94–65 (Dep't Comm. Feb. 13, 1995) [hereinafter *Second Remand Determination].* This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (1988).

BACKGROUND

In *Creswell Trading Corp. v. United States,* 783 F. Supp. 1418 (Ct. Int'l Trade 1992) [hereinafter *Creswell I],* the initial issue faced by this court was whether Commerce appropriately determined that India's IPRS program was countervailable. 783 F. Supp. at 1419. Under the pro-

gram, the Indian government provided a payment to users of domestically-produced pig iron upon export of their finished products, such as iron castings. This payment reimbursed the difference between the more expensive domestic pig iron being used and the lower priced pig iron available on the world market. Plaintiffs claimed the IPRS program was not a countervailable subsidy, pointing to Item (d) of the Illustrative List of Export Subsidies annexed to the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, which defines a subsidy as follows:

> (d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, *if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.*

783 F. Supp. at 1420 (quoting H.R. Doc. No. 153, Pt. I, 96th Cong. 1st Sess. 295 (1979) (emphasis added)). Congress has incorporated the Illustrative List, including Item (d), into United States law by 19 U.S.C. §§ 2502(1) and 2503(c)(5) (1988). *See Creswell Trading Co. v. United States,* 15 F.3d 1054, 1057 n.4 (Fed. Cir. 1994) (noting incorporation) [hereinafter *Creswell III].*

Plaintiffs argued that the IPRS program only reimbursed the difference between the prices of pig iron in the domestic and world markets. Commerce reasoned that, regardless of such reimbursement limitations, the program was still countervailable as a subsidy under U.S. law. This court remanded the case, instructing Commerce to assess the IPRS program in light of the exception to countervailable subsidies—the "if" clause—contained in Item (d).

On remand, Commerce explained that Indian information regarding international prices was unclear, and determined that the record evidence was "ambiguous" and "woefully deficient" to establish the IPRS program was non-countervailable pursuant to Item (d). *Redetermination on Remand: Final Results of Countervailing Duty Administrative Review Pursuant to Court Remand; Certain Iron-Metal Castings From India* (C–533–063) at 4 (Dep't Comm. Mar. 16, 1992). This court upheld the determination, emphasizing the Indian government had failed to carry its burden to establish a singular world market price during the relevant period. *Creswell Trading Co. v. United States,* 797 F. Supp. 1038, 1040–41 (Ct. Int'l Trade 1992) [hereinafter *Creswell II].*

The Court of Appeals for the Federal Circuit (CAFC) in *Creswell III* reversed and remanded the case. The CAFC reasoned that Commerce had the burden of proof to establish by a preponderance of the evidence the statutory condition established by the "if" clause of Item (d)—*i.e.,* Commerce had the ultimate burden of persuasion in convincing a fact finder of the existence of a countervailable subsidy. *Creswell III,* 15 F.3d at 1060–61. The CAFC held that while Commerce had satisfied its bur-

den of production by establishing the existence of the IPRS program, the burden shifted back to Commerce when respondents produced evidence that the pig iron was not provided on terms or conditions more favorable than available on world markets. *Creswell III,* 15 F.3d at 1061. The CAFC determined that Commerce had not met its burden of demonstrating that respondents' information was either inaccurate or insufficient, and that it was procedurally unfair for Commerce to find that the world price information on record was "ambiguous" and "woefully deficient" without allowing respondents an opportunity to supplement the record. *Creswell III,* 15 F.3d at 1059, 1062. The CAFC further noted that Commerce had made no attempt to determine any price at which pig iron could be purchased on international markets during the relevant review period. *Creswell III,* 15 F.3d at 1061.

In the present remand, Commerce determined that although the basic terms and conditions of the provision of pig iron under the IPRS *program* were not more favorable than those commercially available internationally, the IPRS *rebates* were excessive in two respects. *Second Remand Determination* at 3–4. Commerce explained that the Government of India (1) neglected to include ocean freight in calculating a world market price and (2) neglected to factor out the use of scrap in its calculation of IPRS rebate payments. *Id.* at 4. Commerce found the "excessive" portion of the IPRS reimbursements did not meet the Item (d) exception and were countervailable. *Id.* This appeal followed.

DISCUSSION

The ultimate burden of proving countervailability under Item (d) rests with Commerce. *Creswell III,* 15 F.3d at 1056. Therefore, in reviewing these determinations, the court must consider if (1) Commerce has carried its burden of production and produced sufficient evidence to argue the rebates were excessive and (2) if so, whether Commerce has proven by a preponderance of the evidence that the rebates were excessive. *Creswell III,* 15 F.3d at 1060–61. The CAFC has simultaneously instructed that the court is furthermore guided by the statutory standard of review which provides the court's role is to uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(1988); *see also Creswell III,* 15 F.3d at 1056 (providing standard of review). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) *(quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). Although (1) a deferential, substantial evidence standard applied to Commerce as the trier of fact and (2) a preponderance of the evidence standard imposed as if Commerce were a party plaintiff or defendant appear facially inconsistent, the court has endeavored to apply both standards pursuant to the CAFC's instructions.

1. *Commerce's Item (d) Examination Methodology:*

Defendant-Intervenors challenge the *Second Remand Determination* as flawed. Defendant-Intervenors argue Commerce failed to comply with *Creswell III,* because Commerce blindly accepted the Indian government's benchmark world prices. (Dom. Ind. Comments on Results of Redet. on Remand at 3.) According to Defendant-Intervenors, Commerce failed to examine whether the Indian government provided pig iron to exporters on terms or conditions more favorable than those commercially available on world markets to its exporters. *Id.* at 5. They argue Commerce erred in looking only at whether the Indian government applied a consistent, updated calculation methodology for determining rebate figures, rather than looking towards the actual terms and conditions at which pig iron could be purchased on the world market. *Id.*

The court disagrees that Commerce employed an improper methodology in determining whether the IPRS program falls within the Item (d) exception. In conducting its present remand determination, Commerce issued additional questionnaires to the Indian government and Indian castings exporters, and conducted verification of the various price and other submitted information. *(See, e.g.,* Mem. for Barbara E. Tillman of 12/19/94) [hereinafter *Gov't of India Verification].* Commerce furthermore reviewed Indian import transaction figures to assess the comparability of the world price for pig iron with the IPRS world price benchmark for pig iron. *Second Remand Determination* at 11; *(see* Letter from Counsel to Dom. Ind. to Commerce of 12/9/94) (placing Indian import statistics on the record). After such analysis, Commerce determined that the IPRS world price benchmark was deficient in one respect because the IPRS benchmark failed to account for ocean freight costs as allegedly required by Item(d). *Second Remand Determination* at 9.

The record reveals Commerce conducted numerous verifications and did not passively accept Indian world price information. Commerce went beyond looking merely at consistency in the IPRS calculation methodology to include an investigation of the actual terms and conditions at which pig iron could be purchased on world markets. This is most readily supported by Commerce's rejection of the Indian government's preferred IPRS benchmark price in favor of a benchmark price inclusive of freight, a decision which, in part, prompted the present appeal. *Second Remand Determination* at 3–5.

Nevertheless, Defendant-Intervenors claim data on the record reveals IPRS world prices established by both the Indian government and Commerce, whose benchmark is based on the Indian government's world price figures, were artificially derived and were not based on terms or conditions commercially available on world markets to Indian exporters. (Dom. Ind. Comments on Results of Redet. on Remand at 7–30.) More specifically, Defendant-Intervenors challenge the accuracy of the IPRS world benchmark price figures, arguing that even the Indian government's own data calls into question the validity of India's world price figures. *Id.* at 7–20. Defendant-Intervenors assert an aver-

age value of pig iron prices derived from Indian import statistics would be a more appropriate benchmark measure of the world price for pig iron, rather than the lowest prices at which pig iron was available on the world market. *Id.* at 21.

The court disagrees that data from the Indian government reveals that IPRS world prices were not based on terms or conditions for pig iron commercially available on world markets to Indian castings exporters. The record indicates Commerce analyzed information to verify the accuracy and reliability of Indian government and exporters' price data. Through its investigation, Commerce found that pig iron was not traded on international exchanges and thus had no recognized world price. *See Gov't of India Verification* at 4 (noting pig iron is not traded on international exchanges); *see also Creswell III,* 15 F.3d at 1058, 1061 (again noting no international price for pig iron). The Indian government, however, used both actual contracts for imported pig iron as well as other documentation demonstrating the terms and conditions at which various grades of pig iron were available from foreign markets in order to determine an appropriate international price benchmark. *Gov't of India Verification* at 3–4; *Second Remand Determination* at 11, 14–17; *see also Creswell III,* 15 F.3d at 1058 *(quoting* India's Questionnaire Resp. of Aug. 26, 1987, at 14–15.) Commerce also verified that the international benchmark price was revised on a regular basis to account for fluctuations in the exchange rate and new import contracts made by the Steel Authority of India and the parastatal Mines and Mineral Trading Company. *Gov't of India Verification* at 4. Based upon a review of the administrative record, the court finds Commerce's decision to regard Indian price information as an accurate and reliable basis for constructing a world price benchmark is supported by substantial evidence and is in accordance with law.

That Defendant-Intervenors derived a different world price benchmark from Indian government figures does not change this conclusion. Defendant-Intervenors argue that Commerce should have established an IPRS benchmark based on an average of all pig iron prices, rather than limiting its range to the lowest available prices. (Dom. Ind. Comments on Results of Redet. on Remand at 20–23.) They assert such averaged prices are significantly higher than the international prices used by Commerce to determine the appropriate IPRS benchmark. *Id.* at 8–9 & Attach. IV.

Item (d) simply speaks of terms or conditions "commercially available" to a country's exporters on the world market. Item (d) does not explicitly provide that a price term that is commercially available must be an average of all commercially available prices. Indeed, it would stand to reason that a buyer would select the lowest price among all prices that were quoted on world markets. Furthermore, it is well-settled that "[a]n agency's interpretation of a statute is entitled to deference where neither its express language nor the legislative history tells how Congress intended an issue to be decided." *Zenith Elecs. Corp. v. United States,* 77

F.3d 426, 432 (Fed. Cir. 1996). Therefore, the court finds Commerce's decision to determine the appropriate IPRS benchmark on the basis of a lower range of commercially available prices, rather than an average of all prices, to be within its discretion and supported by substantial evidence on the administrative record.

2. *Ocean Freight Costs:*

Commerce found that the Indian IPRS world price benchmark did *not* include ocean transportation costs. *Second Remand Determination* at 4. Plaintiffs and Plaintiff-Intervenors do not dispute this fact. (Pls.' Comments on Agency's Final Remand Results at 6–8; Pl.-Ints.' Comments on Results of Remand at 2–3.) Commerce argues that Item (d) requires that such costs must be included within the world price when determining a permissible—*i.e.,* noncountervailable—rebate payment. *Second Remand Determination* at 4–5. Commerce explains a rebate is noncountervailable so long as the provision of inputs is not on terms or conditions more favorable than those commercially available on world markets to their exporters. *Id.* at 4. Commerce claims the phrase "to their exporters" dictates that shipping costs be included, because Indian iron castings exporters who purchase pig iron internationally would necessarily incur costs of transporting the product to India. *See id.* (noting Item(d) is concerned with a government's provision of goods to exporters). Because those ocean freight costs were not included, Commerce concluded IPRS rebates received by the Indian exporters were excessive by the amount of the delivery charges necessary to ship pig iron to India. *Id.* at 4–5. Commerce therefore determined this excess rebate constituted a countervailable subsidy, because it placed the Indian exporters in a more favorable position than if the exporters had purchased pig iron at the commercially available world market price—*i.e.,* a price inclusive of ocean freight. *Id.*

This court must accord substantial weight to an agency's interpretation of statutes it administers. *American Lamb Co. v. United States,* 785 F.2d 994, 1001 (Fed. Cir. 1986). However, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.,* 474 U.S. 361, 368 (1986). As the CAFC has explained, "Item (d) sets forth on its face" that Commerce must first assess whether the Indian government has delivered pig iron to its exporters on terms or conditions more favorable than terms or conditions commercially available to the exporters on world markets before Commerce may impose a countervailing duty in this case. *Creswell III,* 15 F.3d at 1060. In carrying out this statutory requirement, Commerce has determined that the exclusion of ocean shipping costs has provided Indian exporters with an excessive IPRS rebate and constitutes a term or condition more favorable than commercially available on world markets. *Second Remand Determination* at 4.

The CAFC has stated that the very language of Item (d) requires a comparison in this case between the terms or conditions by which pig

iron is provided to Indian castings exporters and the terms or conditions at which pig iron is commercially available to the same Indian exporters on world markets. *Creswell III*, 15 F.3d at 1060. During the relevant review period, the Indian government provided pig iron to exporters at a relatively high domestic price, but subsequently issued rebates to reimburse castings exporters. *Second Remand Determination* at 1–2. The ultimate result of this practice was that the net price of the pig iron was equivalent to the lower, FOB world price of pig iron, a price that did not include ocean freight costs. *See Creswell III*, 15 F.3d at 1058, 1061 (describing calculation). According to the CAFC, the world price chosen by India represented the price at which "the Indian government believed it could purchase pig iron internationally." *Creswell III*, 15 F.3d at 1058.

Commerce does not challenge the accuracy of the FOB price figure *per se*. Indeed, it concedes that the FOB price is a fair representation of the world price. *Second Remand Determination* at 12. Rather, Commerce asserts Item (d) requires that shipping costs be added to the chosen FOB price figure to ascertain the total costs Indian exporters would incur in actually making foreign pig iron commercially available to them. *Id.*

The Indian government's "pig iron package" provided pig iron as well as domestic delivery at a net price equivalent to the FOB world price. *Gov't of India Verification* at 3–5. By way of comparison, foreign pig iron sources would have provided only undelivered pig iron for the world price—*i.e.*, an FOB price. Neither Indian inland freight nor ocean freight would be included in the FOB price.

In comparing the Indian "pig iron package" with a foreign FOB "pig iron package," it becomes clear that the terms or conditions at which the Indian government delivered pig iron to its exporters were not more favorable by the value of ocean freight, because ocean freight was not a term or condition offered by the Indian government in its "pig iron package." Since the Indian government was offering pig iron *being produced in India*, there would be no need to include an ocean freight term or condition for delivery to Indian exporters. Therefore, ocean freight would be a term or condition irrelevant to the FOB price-based Item (d) comparison at hand.

This result does not change, even if the court were to adopt the argument that the appropriate price comparison is between the Indian government's pig iron price and a foreign pig iron price inclusive of shipping. If one compares the Indian government's pig iron package with a foreign pig iron package inclusive of shipping, the results are as follows:

> *Indian government's pig iron package:* for the world FOB pig iron price, the Indian castings exporters receive pig iron plus domestic delivery.
>
> *Foreign pig iron package:* for the world FOB price plus ocean freight, Commerce's higher total price calculation, the Indian exporters would be entitled to foreign pig iron plus ocean freight.

In such a comparison, it is still apparent that the Indian government is not providing its castings exporters with pig iron on a term or condition more favorable by an amount equal to ocean freight. Ocean freight is simply not a part of the pig iron package being offered by the Indian government because, as noted earlier, the pig iron being offered is produced in India, obviating the need for ocean shipping. If the Indian government had instead imported the pig iron from overseas and delivered it to its castings exporters at the world FOB price, that could be a situation in which the "free ocean delivery" of pig iron would have been a term or condition more favorable than commercially available to the castings exporters on world markets. Of course, this is not the case here.

A comparison of the Indian government's pig iron package with the foreign pig iron package indicates the Indian government provided domestic delivery as well as pig iron at the world price. Foreign suppliers were not including domestic delivery for purchases of pig iron at the world price. Therefore, it would appear that the inclusion of domestic delivery at the FOB world price would be a term or condition more favorable than that commercially available to Indian exporters on world markets. Commerce, however, did not make such a finding. *Second Remand Determination* at 4–5. Rather, with respect to freight, Commerce determined simply that the Indian government's provision of pig iron was on terms or conditions more favorable than commercially available by the value of ocean freight, *id.*, a freight calculation that proves to be irrelevant under the facts as contained in the record in this case. As a result, the court finds that Commerce has not met its burden of proof with respect to showing whether, as the CAFC has required, "the IPRS rebates paid to exporters [exceeded] the difference between the domestic price of pig iron and the price at which [pig iron] could have been purchased internationally." *Creswell III,* 15 F.3d at 1061. The court therefore holds that Commerce's decision to impose a countervailing duty on the basis of the Indian government's non-inclusion of ocean freight in its world price benchmark is unsupported by substantial evidence and is not in accordance with law. The court further instructs Commerce to consider and explain whether the inclusion of inland freight made the Indian government's provision of pig iron more favorable than pig iron commercially available to Indian exporters on the world market. Upon making its determination as to whether the Indian pig iron package was more favorable by the value of domestic delivery, Commerce should revise its subsidy calculation accordingly. Should Commerce determine that the Indian pig iron package was not more favorable by the value of domestic delivery, Commerce should clearly explain the basis for that determination.

3. *Scrap Iron:*

Commerce also found that a second portion of the IPRS rebates were excessive, because that part of the rebates was attributable to consumption of scrap iron, not pig iron. Commerce found that both domestic pig iron and scrap iron were used to produce exported castings. *See Second*

Remand Determination at 5. Scrap iron was not a product entitled to rebates under the IPRS program. Indeed, prior to October 1984, the Indian government used an IPRS rebate formula which was designed to account for the presence of scrap, and thereby rebate only pig iron consumption. *Id.* Beginning in October 1984, the Indian government began calculating rebate payments as if no scrap were used, even though Commerce discovered during verification that casting exporters continued to use scrap after October 1984. *Id.* at 5.

Neither Plaintiffs nor Plaintiff-Intervenors presently dispute the finding that the consumption of scrap iron was not entitled to IPRS rebates. (*See* Pls.' Comments on Agency's Final Remand Results at 14 (limiting argument to ocean freight issue); Pl.-Ints.' Rebuttal to Dom. Ind.'s Comments on Results of Redet. on Remand at 17.) Commerce determined this excess rebate would make the provision of pig iron more favorable than the terms and conditions commercially available on world markets to the Indian castings exporters.

Indian castings exporters were receiving more reimbursements than they were legitimately entitled to, based upon their actual pig iron consumption. *Second Remand Determination* at 5. Those excess rebates, therefore, essentially reduced the net price of pig iron to Indian castings exporters below the IPRS world price benchmark. This supports Commerce's conclusion that the excess rebates provided Indian castings exporters with pig iron on terms or conditions more favorable than those commercially available to its exporters on world markets. Based upon this finding, Commerce decided to countervail this excessive portion of the IPRS rebates attributable to scrap iron, rather than countervail the rebates in their entirety. The court finds Commerce has sustained its burden of proof in showing that the IPRS rebates were excessive as a result of certain rebate payments supposedly made to reimburse pig iron consumption but actually attributable to scrap. The related issue of whether to countervail the excessive portion versus the entire rebate must now be addressed.

Defendant-Intervenors, relying upon *RSI (India) Pvt., Ltd. v. United States*, 687 F. Supp. 605 (Ct. Int'l Trade 1988), *aff'd*, 876 F.2d 1571 (Fed. Cir. 1989), assert the court should countervail the entire rebate, arguing India's IPRS payments were not directly related to the amount of pig iron used in exported castings and that Commerce need not tinker with the IPRS to make it non-countervailable. (Dom. Ind.'s Comments on Results of Redet. on Remand at 23–24, 28–32.) Defendant-Intervenors further declare that because the Indian castings exporters, similar to the exporters in *RSI*, *"have not established an entitlement to an exception to [I]tem (d)*, [Commerce] has no choice in this case whether to countervail IPRS payments in full. It must do so." *Id.* at 32 (emphasis added).

Defendant-Intervenors' latter argument is contrary to the CAFC's directive in *Creswell III*, because the CAFC expressly noted that the Indian exporters did not bear the ultimate burden of showing that they were entitled to an exception under Item (d). Rather, Commerce had the

ultimate burden of showing that the Indian castings exporters were not entitled to an exception under Item (d). According to the CAFC,

> [t]he "if" clause of Item (d) sets forth on its face a statutory condition that *Commerce must establish* before it may exercise its right to levy a countervailing duty against an investigated party, *as opposed to an exception into which that party must prove its actions fall.*

Creswell III, 15 F.3d at 1060 (emphasis added).

Whether *RSI* requires the court to countervail the entire rebate must now be considered. *RSI* involved Indian castings exporters that received IPRS rebates wholly out of proportion to their actual consumption of pig iron. *RSI,* 687 F. Supp. at 608, 611. In that case, the CAFC concluded Commerce "is under no legal duty to construct an *imaginary* noncountervailable subsidy when the real subsidy is not shown to have been constructed in any such way and can not be shown to be nondistortive of market forces." *RSI,* 876 F.2d at 1574 (emphasis added). Neither this court nor the CAFC held in *RSI* that Commerce could never calculate the actual amounts of pig iron consumption for which IPRS rebates were appropriate. *RSI* simply held that, in a situation where IPRS payments bore absolutely no relationship to actual consumption of pig iron, Commerce was under no *legal* duty to calculate the actual consumption of pig iron and the rebate amounts to which Indian exporters were legitimately entitled. *RSI,* 687 F. Supp. at 610–11; *RSI,* 876 F.2d at 1573–74. *RSI* does not preclude Commerce from making such calculations if Commerce deems it appropriate to do so.

Defendant explains Commerce determined the Indian government had a well-established program that consistently applied a clearly defined methodology. (Def.'s Resp. to Comments to Redet. on Remand at 13.) Commerce further found that certain portions of the IPRS rebates were greater than needed to equilibrate the domestic price for Indian pig iron to the world market price. *Id.* at 13–14. Commerce therefore determined that, under Item (d), "those excessive portions of the IPRS rebates represented terms or conditions more favorable than those commercially available to Indian exporters on the world market and, therefore, constituted countervailable subsidies." *Id.* at 14.

As discussed earlier, the record indicates Commerce conducted a careful examination of the terms and workings of the IPRS program to assess its consistency with the requirements of Item (d). *See, e.g.,* discussion *supra* at 8–9. Commerce was thereby able to estimate the excessive value of rebates which went beyond those justified under Item (d) to equilibrate domestic and international pig iron prices. Such an analysis would amount to more than an "imaginary construction" criticized under *RSI,* especially since, as the CAFC has previously noted, "[w]e would be most reluctant to substitute our uninformed judgment for [Commerce's] expertise with respect to the economic effect of an undisputed 'bounty or grant,' and how much duty is necessary to countervail it." *RSI,* 876 F.2d at 1574.

Defendant furthermore argues that Commerce's decision to countervail only the excessive portion of the rebate was correct. Defendant argues that once the excessive portions of the rebate are deducted, "the balance of the rebates results in pig [iron] prices that are *not* more favorable than the pig [iron] prices that are available" internationally. (Def.'s Response to Comments to Redet. on Remand at 31.) Defendant therefore reasons only the excessive portions are properly countervailable.

The court agrees that Commerce's approach of calculating a subsidy on the basis of the excess portion of the IPRS rebates is within its discretion. To the extent the IPRS rebates did not result in pig iron being provided on terms or conditions more favorable than those commercially available on world markets, that portion of the rebate would not be considered a subsidy under the "if" clause of Item(d). Here, only the excessive portion of the rebate—*i.e.,* that portion of the rebate which results in pig iron being provided on terms or conditions more favorable than those commercially available on world markets—is properly considered a subsidy and countervailable.[1] The court therefore finds Commerce's methodology to countervail only those portions of the IPRS reimbursements that are excessive and beyond those needed to equilibrate the terms and conditions of Indian pig iron with pig iron available internationally is supported by substantial evidence and is in accordance with law.

4. *Country-wide Rate Calculation:*

Plaintiff-Intervenors also argue that Commerce should be required to calculate the country-wide rate—rather than only separate *ad valorem* rates which are not the countervailing duty rates that Commerce will ultimately apply—prior to the dismissal of this action. (Pl.-Ints.' Comments on Results of Remand at 11.) Defendant contends it would be premature to require Commerce to calculate the country-wide rate before a final court decision on the IPRS issues has been made. (Def.'s Resp. to Comments to Redet. on Remand at 34.) Given the procedural history of this case, it is possible that, once Commerce prepares revised *ad valorem* rates as instructed by this opinion, the case could be remanded yet again. However, it is also possible that the court will sustain Commerce's revised *ad valorem* rates, at which point a look at Commerce's country-wide rate calculation would be appropriate. Once the *ad valorem* rates have been ascertained, Commerce will have to calculate a country-wide rate. Given this fact, the court does not believe it would be inappropriate or impose an undue burden upon Commerce to calculate a country-wide rate along with revised *ad valorem* rates. Upon remand, therefore, Commerce should calculate the appropriate country-wide rate it intends to apply in this case.

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[1] As noted earlier, whether the Indian government's provision of inland freight comprises such an excessive portion of the rebate is to be determined upon remand.

5. *Govind's Steel Subsidy:*

Plaintiff-Intervenors additionally argue that Commerce erred in calculating Govind Steel's subsidy in a key respect. Commerce allegedly erred by attributing all of Govind Steel's 1985 IPRS payments to its 1985 exports, although much of the payment received in 1985 was for exports made in 1984. (Pl.-Ints.' Comments on Results of Remand at 12.)

Defendant contends Govind Steel's complaint that its subsidy is overstated is without merit. Commerce's practice is to allocate the amount of subsidy received in one year to the company's exports made during that year. (Def.'s Resp. to Comments to Redet. on Remand at 36–37.) Defendant explains Commerce followed this practice with respect to the IPRS program for all Indian exporters, and that an exception for Govind Steel is not warranted. *Id.; Second Remand Determination* at 18. In addition, Commerce has previously noted that any methodological change would result in a significant gap in the measurement of IPRS subsidies between review periods. *Certain Iron-Metal Castings From India: Final Results of Countervailing Duty Administrative Review,* 55 Fed. Reg. 50,747, 50,750 (Dep't Comm. 1990). When Commerce calculated subsidies by allocating the amount of IPRS rebates received in 1984 to the company's exports made during that same year for the 1984 review period, the Indian exporters did not challenge the propriety of this methodology. *Id.* Therefore, Govind's 1984 rebate payments were applied to the total value of its exports in 1984. Plaintiff-Intervenors now ask Commerce to apply Govind's 1985 rebates over largely the same exports from 1984, claiming the rebates Govind received in 1985 were mainly derived from its exports in 1984. (Pl.-Ints.' Comments on Results of Remand at 12.) If Commerce were to make this methodological change, 1984 exports would essentially be "double-counted" for purposes of allocating rebate payments, thereby distorting the resulting subsidy calculation.

Commerce has broad latitude to implement the statutory scheme it is charged with administering, provided its implementation is reasonable, is in accordance with law, and follows expressed Congressional intent. *See Saarstahl AG v. United States,* 78 F.3d 1539, 1542, 1544 (Fed. Cir. 1996) (noting "Commerce's construction must be sustained if it 'falls within the range of permissible construction.'") Neither Item (d) nor 19 U.S.C. § 1675 (1988), which provides for administrative review of determinations, directly addresses the allocation methodology for benefits from a subsidy. This silence, therefore, leaves selection of an allocation methodology to the discretion of Commerce. *See Saarstahl,* 78 F.3d at 1544 (explaining "[i]n the absence of specific mandates * * * Commerce's approach must be accorded deference.") Because Commerce maintained a consistent calculation methodology applied to all Indian exporters, the court finds Commerce did not abuse its discretion in declining to grant Govind an exception to Commerce's calculation methodology.

Plaintiff-Intervenors also claim Commerce improperly relied upon Govind's total pig and scrap iron consumption figures, rather than Govind's more narrowly tailored figures for its exported subject castings in determining Govind's excess rebate. (Pl.-Ints.' Comments on Results of Remand at 13–14.) Govind suggests that it used only pig iron and no scrap iron to produce its exported subject castings during the relevant review period. *Id.* Govind therefore argues Commerce should use Govind's pig iron and scrap iron consumption figures for exported castings, rather than its pig and scrap iron consumption figures for all domestic and export production.

The court is unconvinced. Plaintiff-Intervenors' arguments on this point are unclear and inconsistent. Plaintiff-Intervenors assert that "in 1983, '84, and '85 * * * Govind consumed considerably more pig iron than would have been required to produce *all* the exported subject castings out of 100% pig iron." *Id.* at 13. That Govind consumed more pig iron from 1983–1985 than would have been required to produce all the exported subject castings over that period does not automatically substantiate Govind suggestion that it used no scrap iron to produce exported castings in 1985. After all, Govind's own production history shows that, despite allegedly large quantities of pig iron purchases, Govind also used significant quantities of scrap iron in its exported castings. For instance, in 1984, Govind's exported castings were composed of nearly one-third of scrap iron. *Id.* at Ex. 4. In 1983, its exported castings were composed of over one-third of scrap iron. *Id.* Even in the face of such figures derived from Govind's own numbers, Plaintiff-Intervenors inexplicably insist that Commerce's decision to employ Govind's total consumption figures rather than its more narrowly tailored figures "was not appropriate since *there is nothing in the record suggesting* that, contrary to Govind's submission, *the company used significant amounts of scrap* to produce the subject castings." *Id.* at 14 (emphasis added).

Plaintiff-Intervenors' inconsistent arguments provide no basis for challenging Commerce's use of Govind's total pig iron and scrap iron consumption figures. Indeed, Commerce decided to use ratios derived from total pig and scrap iron consumption, because none of the Indian exporters verified could "verify the validity of the raw material breakdown it provided for [exported] subject castings." *Second Remand Determination* at 14. Under these circumstances, the court finds Commerce was within its discretion to apply a pig iron consumption ratio derived from Govind's total consumption figures of pig iron and scrap iron, rather than Govind's allegedly more accurate, narrowly tailored figures.

6. *Clerical Error Regarding Wastage:*

Plaintiff-Intervenors finally allege that Commerce made a clerical error relating to wastage. (Pl.-Ints.' Comments on Results of Remand at 8.) Defendant concedes this mistake, and agrees a remand is necessary on this point to correct the error. (Def.'s Resp. to Comments to Redet. on

Remand at 35–36.) Commerce should revisit the wastage calculation to ensure that the relevant calculations are consistent with the present findings and instructions of the court.

CONCLUSION

Commerce's *Second Remand Determination* is sustained in part and remanded in part. In recalculating the subsidy rates on remand, Commerce shall eliminate its previous ocean freight cost adjustment to the IPRS benchmark pig iron price, consider and explain whether the IPRS benchmark pig iron price must be adjusted for inland freight costs, revisit the wastage calculation, and calculate a country-wide rate, in accordance with the specific instructions set forth in this opinion.

The remand results shall be filed with the court within 45 days from the date of this opinion. Any party contesting the remand results shall file comments within 30 days of the remand results. Commerce may file its response to any comments within 15 days of the filing of the comments.

(Slip Op. 96–138)

WOLFF SHOE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–08–00557

Plaintiff moves this Court for summary judgment pursuant to Rule 56 of the Rules of this Court contesting the rate of regular and countervailing duties and the underlying payment of interest assessed by the United States Customs Service ("Customs") on non-rubber footwear imported by plaintiff from Spain. Defendant opposes plaintiff's motion and cross-moves for summary judgment.

Held: Plaintiff's motion for summary judgment is granted to the extent that Customs is required to reliquidate 193 of the entries at issue and refund with interest any duties in excess of those asserted at the time of entry by the importer less any interest already refunded. Defendant's motion for summary judgment is granted to the extent that the rate of duty asserted at the time of entry includes countervailing duties. The remaining ten entries at issue are severed and dismissed.

[Plaintiff's motion for summary judgment is granted in part and denied in part; defendant's cross-motion for summary judgment is granted in part and denied in part.]

(Dated August 16, 1996)

Sosnov & Associates (Steven R. Sosnov) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(James A. Curley);* of counsel: *Edward N. Maurer,* Office of the Assistant Chief Counsel, United States Customs Service, for defendant.

OPINION

TSOUCALAS, *Judge:* Plaintiff, Wolff Shoe Co. ("Wolff"), moves pursuant to Rule 56.2 of the Rules of this Court for summary judgment on

the ground that there is no genuine issue as to any material facts. Defendant cross-moves for summary judgment seeking an order dismissing this case.

Wolff challenges the assessment by the United States Customs Service ("Customs") of countervailing duties and the underlying payment of interest on 203 entries of non-rubber footwear imported by Wolff from Spain between the years of 1980 and 1982.

BACKGROUND

Wolff filed five protests against liquidations of the various entries in this case which were decided in August and September of 1991. The grounds asserted in the protests were (1) countervailing duties should not have been assessed, or, alternatively, (2) if countervailing duties are applicable, the duty should not exceed the estimated amount, and/or (3) interest should not have been assessed from the date the estimated duties were deposited through the date of liquidation. Customs checked the "approved" box on these protests and added a handwritten "in part" and stamped "approved as to interest computation." The entries were then reliquidated only as to interest and the difference was refunded to Wolff.

Wolff then protested the reliquidations on November 19, 1991, re-asserting grounds (1) and (2) without the claim as to interest. This subsequent protest was denied on March 6, 1992, based on the conclusion that it was duplicative of the original protests filed in this matter.

Wolff then filed a summons in this Court on August 13, 1992. In response, defendant moved to dismiss this action claiming that this Court lacks jurisdiction because Wolff filed its summons more than 180 days after its protests were denied in violation of 28 U.S.C. § 2636(a) (1988) and, alternatively, that Wolff fails to state a claim upon which relief can be granted. The Court denied defendant's motion to dismiss finding that Customs approved Wolff's protest of the liquidation, Wolff's subsequent protest of reliquidation was valid and timely, and this action was timely brought pursuant to 28 U.S.C. § 2636(a). *Wolff Shoe Co. v. United States,* 18 CIT ____, 861 F. Supp. 133 (1994). On May 12, 1995, the Court denied Wolff's motion for order for judgment and Wolff subsequently filed the motion for summary judgment presently before the Court.

UNDISPUTED FACTS

On September 12, 1974, Commerce published its countervailing duty determination with respect to non-rubber footwear from Spain. *See Non-rubber Footwear From Spain,* 39 Fed. Reg. 32,904 (1974). Wolff did not actively participate in this countervailing duty determination or subsequent § 751 reviews arising therefrom.

Wolff made 203 entries of non-rubber footwear from Spain over a three year period (1980, 1981 and 1982). On October 19, 1983, the court entered a temporary restraining order in *Volume Footwear Retailers of Am. v. United States,* Court No. 83–10–01500, restraining Customs

from liquidating all entries of non-rubber footwear from Spain "currently classifiable under items 700.0500 through 700.4575, 700.5605 through 700.5673, 700.7220 through 700.8360, and 700.9515 through 700.9545 of the Tariff Schedules of the United States Annotated" and which were exported "on or before December 31, 1980, and entered, or withdrawn from warehouse, for consumption on or after January 1, 1980, and no later than May 2, 1982, and remain unliquidated as of 5 p.m. on the next business day following the date of service and receipt of this order." The court entered preliminary injunctions on November 9, 1983, and August 10, 1984, restraining Customs from liquidating entries of non-rubber footwear from Spain. *See Volume Footwear Retailers of Am. v. United States ("Volume Footwear")*, 10 CIT 12, 13 (1986). The preliminary injunctions were deemed to have expired on May 15, 1985. *See id.* at 15. Customs liquidated the involved entries in 1986.

Wolff filed Protest Nos. 1001–6–008054, 1001–6–008055, 1001–6–008056, 1001–6–008059 and 1001–6–008060 asserting the following grounds: (1) countervailing duties should not have been assessed, or (2) if countervailing duties are applicable, the duty should not exceed the estimated amount, and/or (3) interest should not have been assessed from the date the estimated duties were deposited to the date of liquidation. Customs checked the "approved" box on these protests and added a handwritten "in part" and stamped "approved as to interest computation." The choices on the form were "approved" and "denied in full or in part." The entries were reliquidated as to interest only and the difference was refunded to Wolff.

On November 19, 1991, Wolff protested the reliquidations under Protest No. 1001–91–108182 re-asserting grounds (1) and (2) of the earlier protest but not asserting a claim as to interest. On March 6, 1992, Customs denied Protest No. 1001–91–108182 on the ground that it was duplicative of the original protests filed in this matter. Wolff then filed a summons in this Court on August 13, 1992.

DISCUSSION

On a motion for summary judgment, it is the function of the court to determine whether there remain any genuine issues of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Once the court determines that no genuine issue of material fact exists, summary judgment is properly granted when the movant is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987). In the case at bar, this Court finds there are no genuine issues of material fact with respect to the issues involving the entries listed under Schedules I and II in the attachments to Wolff's brief, the dispositive issues to be resolved are legal in nature and, therefore, summary judgment is proper. Regarding the ten entries listed under Schedule III in the attachments to Wolff's brief, there exists a genuine issue of material fact and, therefore, summary judgment is not appropriate. Accordingly, the ten entries listed under Schedule III are severed from the summary judgment motion before the Court and dismissed. *See infra* at 15.

A. *Jurisdiction:*

Defendant urges the Court to reconsider its decision of August 24, 1994, denying defendant's motion to dismiss for lack of jurisdiction or, in the alternative, for failure to state a claim upon which relief may be granted. Defendant emphasizes that since that opinion was not a final decision by the Court, it may be reconsidered at this stage in the proceedings. Def.'s Opp'n to Pl.'s Mot. Summ. J. at 4–6. Defendant maintains that the only matter approved in Wolff's protests against liquidation was the recomputation of interest. Defendant supports its argument by emphasizing that Customs refunded only the recomputed interest which constituted a denial of the protests as to duty assessments. As such, defendant argues that in order for this Court to have jurisdiction, Wolff would have had to file the summons with this Court within 180 days from the date Customs denied the initial protests. *Id.* at 6–7.

The Court declines defendant's invitation to reconsider the jurisdictional issue decided by the Court in *Wolff Shoe,* 18 CIT at ____, 861 F. Supp. at 135–36. Wolff brought this action within 180 days of the denial of the protest of the reliquidations. Wolff could not have brought this action prior to receiving a denial of the protests from Customs, and since Customs did not deny the initial five protests, Wolff could not have filed an action in this Court until after the denial of the protest of reliquidation. Defendant's evidence regarding the refund checks is unpersuasive as it does not alter Customs' decision to check the "approved" box as opposed to the "denied in full or in part" box in response to the initial five protests. The refund of the interest only is as meaningless as the stamp on the form "approved as to interest computation." The Court adheres to its conclusion in *Wolff Shoe* that Customs left the substance of the protests open by not specifically denying it. Accordingly, Wolff properly protested Customs' reliquidation and timely filed a summons in this Court pursuant to 28 U.S.C. § 2636(a). This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988) which grants the Court exclusive jurisdiction over any civil action commenced to contest Customs' denial of a protest. The jurisdictional question decided, the Court now turns to the issues surrounding the liquidation of the entries.

B. *Schedule I Entries:*

Wolff maintains that 135 of the entries, attached to Wolff's brief as "Schedule I", were less than four years old when the suspension required by statute or court order ended, but more than four years old when Customs liquidated the entries. Wolff argues that pursuant to § 504 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1504 (1988), all entries not yet liquidated at the expiration of four years from the date of entry "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record." Accordingly, Wolff asserts that the subsequent liquidations by Customs were voidable. Pl.'s Mem. Supp. Mot. Summ. J. at 4–5.

Defendant concedes that if the Court possesses jurisdiction, the Schedule I entries may be deemed liquidated pursuant to 19 U.S.C. § 1504(d) at the rate and amount of duty deposited by Wolff as regular duties and countervailing duties at the time of entry. Defendant emphasizes, however, that the duty "asserted at the time of entry by the importer" pursuant to 19 U.S.C. § 1504(d) includes the amount of countervailing duty required to be paid. Defendant argues that pursuant to 19 C.F.R. § 159.11(a) (1995), the time for determining the rate and amount of duty asserted by the importer is the "time of filing an entry summary for consumption in proper form, with estimated duties attached." Defendant submits that the entry summaries for the entries in issue state the rate and amount of regular and countervailing duties. Further, the defendant submits as evidence handwriting in blue ink on one of the invoices for an entry involved in this case which states "700.4540/10% CVD 2.27% C–469–022–000." Consumption Entry, Def.'s Opp'n to Pl.'s Mot. Summ. J., Ex. E ("Exhibit E"). Defendant notes that only the importer or its agents may write in blue on the invoice pursuant to 19 C.F.R. § 141.90(d) (1995) and, therefore, the writing indicates that at the time of filing the entry summary, Wolff "asserted" that the duties included 2.27% countervailing duties. Def.'s Opp'n to Pl.'s Mot. Summ. J. at 8.

In rebuttal, Wolff claims that defendant misinterprets the statue and regulations. Under Wolff's reading of the statute and regulations, an importer does not "assert" countervailing or antidumping duties at the time of entry. Wolff stresses that according to the applicable regulation, the district director is responsible for determining the necessary amount of estimated duties. Pl.'s Reply to Opp'n to Pl.'s Mot. Summ. J. at 5–6 (referring to 19 C.F.R. § 141.103 (1995)).[1]

Section 1504(d), Title 19, United States Code, states that any entry not liquidated within four years is "deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record, unless liquidation continues to be suspended as required by statute or court order." *See Nunn Bush Shoe Co. v. United States*, 16 CIT 45, 47–48, 784 F. Supp. 892, 894–95 (1992) (interpreting 19 U.S.C. § 1504 as meaning that if an entry is not liquidated within four years, unless the period is extended by operation of 19 U.S.C. § 1504(b)(1)–(3), it will be deemed liquidated by operation of law and subsequent attempts by Customs to liquidate will be invalid).

There is no question that pursuant to 19 U.S.C. § 1504(d), Wolff is entitled to a refund of duties paid with interest in excess of those asserted at the time of entry by the importer and any interest paid on those duties (less any refunds of interest already granted). *See* 19 U.S.C.

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[1] The Court assumes that counsel for Wolff intended to cite 19 C.F.R. § 141.103 instead of "19 C.F.R. § 104.103" which does not exist.

§ 1677g.[2] These entries were less than four years old when the court-ordered suspension was removed but more than four years old at the time of liquidation and, therefore, Customs' attempt to liquidate the entries after four years had passed was invalid. Defendant concedes this point and the Court agrees that Wolff's entries are to be deemed liquidated at the rate of duty asserted at the time of entry by the importer of record. However, a dispute remains between the parties as to whether the duties required to be paid include countervailing duties.

Customs' regulations provide the Court with significant guidance in this area. Entries liquidated by operation of law are addressed in 19 C.F.R. § 159.11(a) which states the following:

> Except [where there is an extension of time] an entry not liquidated within 1 year from the date of entry of the merchandise * * * shall be deemed liquidated by operation of law at the rate of duty, value, quantity, and amount of duties asserted by the importer at the time of filing an entry summary for consumption in proper form, with estimated duties attached * * *.

For purposes of determining the appropriate rate of duty, the regulation directs Customs to the filing of an entry for consumption with the attached estimated duties.

The entry summary labeled Exhibit E by defendant indicates that countervailing duties were included in the calculation of estimated duties at the date of entry. Wolff does not deny this but, rather, claims that it does not support the conclusion that Wolff "asserted" the rate of duty as including countervailing duties. It is true that 19 C.F.R. § 141.103 states that "[e]stimated duties shall be deposited in an amount deemed necessary by the district director to sufficiently cover the prospective duties on each item being entered or withdrawn." This regulation seems to indicate that an importer does not really "assert" the amount of duty to be deposited. However, Wolff fails to present plausible alternative readings of 19 U.S.C. § 1504 and 19 C.F.R. § 159.11. Under Wolff's analysis, importers would never be required to pay countervailing duties for entries liquidated by operation of law because they would never "assert" them. While Congress' choice of words may not be the most accurate possible, Wolff's interpretation could result in the circumvention of the countervailing duty law. To avoid this result, countervailing duties assessed at the time of entry must be included in the rate of duty determined when liquidation is required by operation of law pursuant to 19 U.S.C. § 1504(d). Thus, the Court concludes that the entries listed under Schedule I have been liquidated as a matter of law four

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[2] 19 U.S.C. § 1677g (1988) sets forth the following guidelines for interest on overpayments and underpayments of duties:

(a) General rule

Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after—

(1) the date of publication of a countervailing or antidumping duty order under this subtitle or section 1303 of this title, or

(2) the date of a finding under the Antidumping Act, 1921.

(b) Rate

The rate of interest payable under subsection (a) of this section for any period of time is the rate of interest established under section 6621 of title 26 for such period.

years after their initial entry at the rate and amount of duty deposited by Wolff as regular duties and countervailing duties at the time of entry. Wolff is entitled to a refund of all excess duties paid with interest less any interest already refunded.

C. *Schedule II Entries:*

Wolff also submits that summary judgment is proper with respect to the 58 entries listed under "Schedule II" in the attachments to Wolff's brief. The crux of Wolff's argument is that it was not a party in the *Volume Footwear* cases and, therefore, the injunctions against liquidation did not apply to Wolff. As such, Wolff maintains that Customs could have liquidated Wolff's entries before the injunctions were dissolved pursuant to 19 U.S.C. § 1504(d). Wolff explains that only an interested party may make the necessary showing for having an injunction granted. Wolff notes that a party moving for an injunction must demonstrate the existence of the following four factors: (1) petitioner will be immediately and irreparably injured; (2) petitioner is likely to succeed on the merits; (3) the public interest will be better served by the injunction; and (4) the balance of hardships on the parties favors petitioner. Pl.'s Mem. Supp. Mot. Summ. J. at 5–8 (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)). According to Wolff, only a party that is involved in the litigation can make a proper showing that the requested relief should be granted.

Wolff emphasizes that the entries listed in Schedule II were less than four years old at the time the injunctions were issued in *Volume Footwear*, but more than four years old when the injunctions were dissolved. Therefore, Wolff contends that when Commerce made its § 751 determinations in 1983 and 1984, liquidations suspended pursuant to the statute were no longer in effect and entries not liquidated within four years of the entries were deemed liquidated pursuant to 19 U.S.C. § 1504(d). Pl.'s Mem. Supp. Mot. Summ. J. at 8–9.

In response, defendant contends that Wolff is not entitled to duty refunds for those entries listed under Schedule II. Defendant interprets the injunctions issued by the court as applying to all entries of non-rubber footwear from Spain, not just to those entries imported by the parties in that case. Defendant suggests that Wolff should have requested the Court to modify the injunctions to permit Customs to reliquidate Wolff's entries. *Id.* at 10–11.

Rule 65(d) of the Rules of this Court states that a preliminary injunction or restraining order "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Wolff does not fall into any of the categories described in Rule 65(d). Neither Wolff nor any party representing Wolff in any capacity was a party to *Volume Footwear* as the only plaintiff in that action was Volume Footwear Retailers of America. In addition, there is no evidence that Wolff was in active concert or participation with Volume Footwear Retailers of Amer-

ica. Finally, there is also no indication in the record before the Court that Wolff received actual notice of the order by personal service or otherwise. Therefore, according to Rule 65(d) of this Court, the preliminary injunction issued in *Volume Footwear* could not be binding on Wolff.

Pursuant to 19 U.S.C. § 1504(d), the entries under Schedule II were deemed liquidated at the expiration of four years from the date of entry at the rate of duty asserted by the importer at the time of entry including any countervailing duties required to be paid. Wolff is entitled to a refund with interest of duties paid in excess of those rates asserted at the time of entry less any refunds of interest already made. *See* 19 U.S.C. § 1677g.

D. *Schedule III Entries:*

Finally, Wolff maintains that the Court should dismiss the remaining ten entries listed under "Schedule III" in the attachments to Wolff's brief if the Court grants the summary judgment motion with respect to the other entries. In the event that the Court does not grant the summary judgment motion with respect to the entries listed in Schedules I and II, Wolff advances two alternative arguments regarding the entries listed in Schedule III. First, Wolff suggests that a trial is necessary to determine whether Wolff ever received the appropriate notices of the suspension of liquidation as required by 19 U.S.C. § 1504(c). Second, Wolff alleges that this Court's finding that Customs approved the protests is sufficient to support Wolff's motion for summary judgment. Pl.'s Mem. Supp. Mot. Summ. J. at 9–12.

Defendant responds that because there is a factual dispute as to whether or not Wolff received proper notices of the suspension of liquidation, the Court may not grant summary judgment on this issue in favor of Wolff. Instead, defendant argues that the government is entitled to a presumption of correctness that has not been rebutted by Wolff. *Id.* at 12–13.

Since the Court has granted Wolff's motion for summary judgment with respect to the entries involved in Schedules I and II, with the exception of the claim that countervailing duties should not be included in the rate of duty for the entries at issue, the Court grants Wolff's request to sever and dismiss the remaining ten entries listed under Schedule III.

CONCLUSION

For the foregoing reasons, the Court grants plaintiff's motion for summary judgment to the extent that it finds that Customs erroneously calculated the duties required to be paid by exceeding the estimated amount at the time of entry. Defendant's cross-motion for summary judgment is granted to the extent that Customs properly included countervailing duties in its assessment. Customs is hereby ordered to reliquidate the entries listed under Schedules I and II at the rate of duty asserted by the importer at the time of entry, including any countervailing duty required to be paid, and to refund with interest any excess duties paid less the amount of interest already refunded. The entries listed under Schedule III are severed and dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/75 8/14/96 Wallach, J.	Frech U.S.A., Inc.	96–03–00873	8462.10.00 4.4%	8454.30.00 Duty free	Agreed statement of facts	Chicago Frech DAM 200 hot chamber die casting machine
C96/76 8/14/96 Goldberg, J.	Lenox Collections, a division of Lenox, Inc.	91–10–00739, 92–01–00008 and 94–02–00104	6911.10.80 or 6911.10.50 26% depending on the date of entry	6913.10.50 9%	Lenox Collections *v.* United States CIT Slip Op. 96–30 February 2, 1996	Philadelphia Ornamental porcelain spice jars and canisters
C96/77 8/14/96 Wallach, J.	Weig Karton, Inc.	95–07–00865	4804.59.00 4%	4807.99.40 Duty free	Agreed statement of facts	Houston Gypsum liner-board paper imported from Germany

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